Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 22 OCTOBER 26, 1988 No. 42/43

This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Parts 19, 112, 146

(T.D. 88–63)

CUSTOMS REGULATIONS AMENDMENTS RELATING TO THE SUSPENSION OR REVOCATION OF THE RIGHTS OF A PROPRIETOR TO OPERATE A BONDED WAREHOUSE, THE PRIVILEGE OF OPERATING A CONTAINER STATION, A CARTMAN'S OR LIGHTERMAN'S LICENSE OR THE ACTIVATED STATUS OF A FOREIGN TRADE ZONE AND ASSOCIATED PRIVILEGES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations setting forth the conditions under which the rights, privileges or licenses of bonded warehouses, container stations, cartment, lightermen and Foreign Trade Zone (FTZ) operators can be suspended or revoked. These changes focus on the status of corporate operators or license holders liable to suspensions or revocations because of the conviction of a corporate officer of a felony or misdemeanor if the misdemeanor involves theft, smuggling or a theft-connected crime. The purpose of the changes is to make it clear that resignation of the officer before conviction does not avoid the suspension or revocation jeopardy to the corporate license, rights or privileges.

The changes also no longer limit, where applicable, suspensions or revocations to situations where there is a conviction. In the absence of a conviction, commission of acts constituting a felony, theft, smuggling or theft-related crime, subject to the protections afforded by the administrative procedures applicable, will be sufficient under the changes to warrant suspension or revocation.

EFFECTIVE DATE: November 14, 1988.

FOR FURTHER INFORMATION CONTACT: Currita Waddy, Office of the Chief Counsel (202) 566–2482.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Included among the reasons enumerated for suspending or revoking the right of a proprietor to operate a bonded warehouse (19 CFR 19.3(e)(3)), suspending or revoking the privilege of operating a container station (19 CFR 19.48(a)(3)), suspending or revoking the license of a cartman or lighterman (19 CFR 112.30(a)(5)), or suspending the activated status of a Foreign Trade Zone (FTZ), or the privileges of an FTZ user (19 CFR 146.82(a)(3)), is the conviction of a corporate officer of a felony, or conviction of a misdemeanor involving theft, smuggling or a theft-connected crime. However, it has come to the attention of the Customs Service that these provisions have been literally interpreted as precluding suspension or revocation if the offending corporate officer resigns and leaves the corporation before conviction. Customs proposed to clarify the regulations and avoid this interpretation with respect to cartment and lighterman in a notice of proposed rule making published in the Federal Register on August 26, 1986 (51 FR 30376). Another notice was published on October 30, 1987 (52 FR 41734), to extend the proposal to the similar reasons for suspensions or revocations applicable to bonded warehouses, container stations and FTZ's, which were subject to the same misinterpretation.

Since commission of the type of offense involved under existing provisions applicable to FTZ operators is sufficient, without a conviction, for a suspension, Customs also proposed making commission of an offense similarly sufficient by itself for suspensions or revocations involving bonded warehouses, container stations, cartmen and lightermen.

A total of three comments were received in response to the proposed amendments.

ANALYSIS OF COMMENTS

Two commenters agreed that the existing regulations allow a wrongdoer corporate officer to resign to avoid disciplinary action against their corporation and commended the proposed amendments as closing this loophole.

Another commenter objected to both proposals. First, this commenter stated that they were strongly opposed to the proposed changes as overly broad since the proposed amendments would suspend a right, license or privilege for any felony or misdemeanor involving theft by a corporate officer. This commenter contended that the crime serving as the basis of the disciplinary action should be related to the importation or exportation of goods into or out of the United States or should be connected with the corporate officer's responsibilities with respect to a corporate warehouse proprietor, container station operator, cartmen, lighterman or FTZ operator. This commenter also objected to suspension or revocation on the ba-

sis of an alleged commission of an illegal act and claimed that such action should be restricted to conviction.

However, Customs does not agree. While the relationship of a crime to importing or exporting or to responsibilities under a bond, privilege or license may be pertinent to the type of disciplinary action proposed, that should not be a controlling consideration. Crimes relating to matters other than the importation or exportation of goods, or to a licensee's responsibilities, are, nevertheless, related to the broader considerations of trust inherent in the entitlement to the rights, privileges or licenses issued by the Customs Service.

Further, we do not agree that disciplinary action should only be based on a conviction rather than the commission of acts constituting a specified offense. Suspensions or revocations are not based on mere allegations, but are subject to the administrative due process procedures provided in the applicable Customs regulations. In those procedures, a finding that a corporate wrongdoer is not guilty in a criminal trial does not bind the Customs Service in an administrative proceeding. Further, in the administrative proceeding, Customs is not determining a criminal penalty, but is making a judgment as to the corporation's fitness to continue under a right, privilege or license originally granted by Customs.

Finally, one commenter expressed concern about the statement in the "Background" section of the Federal Register notice that the person's employment status at the time of conviction with respect to the corporate operator or licensee was "unimportant." This commenter stated that this factor is important, but should not be determinative, and that Customs may take into account the fact that an innocent corporation immediately terminated the offending officer upon discovery of the wrongdoing. We agree that employment status is not entirely irrelevant. The decision to suspend or revoke will be made upon consideration of all facts pertinent to a particular case. We regret the misconstruction of our intentions which the language objected to unintentionally may have conveyed to some readers.

For the above reasons, the amendments to the Customs Regulations are adopted as proposed.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that the regulation amendments will not have significant impact on a substantial number of small

entities. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

DRAFTING INFORMATION

The principal author of this document was James C. Hill, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR

In general
Customs duties and inspection, Imports.

Part 19
Warehouses.

Part 112
Administrative practices and procedures.

Part 146
Foreign Trade Zones.

AMENDMENTS TO THE REGULATIONS

PART 19—CUSTOMS WAREHOUSES, CONTAINER STATIONS AND CONTROL OF MERCHANDISE THEREIN

1. The authority citation for Part 19 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624.

§ 19.48 also issued under 19 U.S.C. 1499, 1623.

§ 19.3 [Amended]

2. Section 19.3(e)(3) is revised by removing the semicolon, replacing it with a period, and adding the following, "Any change in the employment status of the corporate officer (e.g., discharge, resignation, demotion, or promotion) prior to conviction of a felony or prior to conviction of a misdemeanor involving theft, smuggling, or a theft-connected crime, resulting from acts committed while a corporate officer, will not preclude application of this provision;"

3. Section 19.48(a)(3) is revised to read as follows:

§ 19.48 Suspension or revocation of the privilege of operating a container station; hearings.

(a) * * *

(3) The container station operator or an officer of a corporation which has been granted the privilege of operating a container station is convicted of or has committed acts which would constitute a felony, or a misdemeanor involving theft, smuggling, or a theft-connected crime. Any change in the employment status of the corporate officer (e.g., discharges, resignation, demotion, or promotion) prior to conviction of a felony or prior to conviction of a misdemean-

or involving theft, smuggling, or a theft-connected crime, resulting from acts committed while a corporate officer, will not preclude application of this provision;

* * * * * * *

PART 112 — CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 continues to read as follows:

Authority: 19 U.S.C. 66, 1551, 1565, 1623, 1624.

2. Section 112.30(a)(5) is revised to read as follows:

§ 112.30 Suspension or revocation of license.

(a) * * *

(5) The holder of such a license or an officer of a corporation holding such a license is convicted of or has committed acts which would constitute a felony, or a misdemeanor involving theft, smuggling, or a theft-connected crime. Any change in the employment status of the corporate officer (e.g., discharge, resignation, demotion, or promotion) prior to conviction of a felony or prior to conviction of a misdemeanor involving theft, smuggling, or a theft-connected crime, resulting from acts committed while a corporate officer, will not preclude application of this provision;

* * * * * * *

PART 146 — FOREIGN TRADE ZONES

1. The authority citation for Part 146 continues to read as follows:

Authority: 19 U.S.C. 66, 81a–81u, 1202 (Gen. Hdnote 11), 1623, 1624.

2. Section 146.82(a)(3) is revised to read as follows:

§ 146.82 Suspension.

(a) * * *

(3) The operator, or any officer of a corporation which has been granted the right to operate a zone, is convicted of or has committed acts which would constitute a felony, or misdemeanor involving theft, smuggling, or a theft-connected crime. Any change in the employment status of the corporate officer (e.g., discharge, resignation, demotion, or promotion) prior to conviction of a felony or prior to conviction of a misdemeanor involving theft, smuggling, or a theft-connected crime, resulting from acts committed while a corporate officer, will not preclude application of this provision;

* * * * * * *

MICHAEL H. LANE,
Acting Commissioner of Customs

Approved: September 15, 1988.

SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, October 14, 1988 (53 FR 40218)]

(T.D. 87–64)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 USC 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C. Customs Regulations (19 CFR 159, Subpart C).

Quarter beginning: October 1, 1988 through December 31, 1988.

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.784400
Austria	Schilling	0.076330
Belgium	Franc	0.025641
Brazil	Cruzado	N/A
Canada	Dollar	0.826105
China, P.R.	Renimbi yuan	0.267996
Denmark	Krone	0.139860
Finland	Markka	0.227015
France	Franc	0.157778
Germany	Deutsche mark	0.537346
Hong Kong	Dollar	0.128000
India	Rupee	0.068681
Iran	Rial	N/A
Ireland	Pound	1.440000
Italy	Lira	0.000721
Japan	Yen	0.007482
Malaysia	Dollar	0.372856
Mexico	Peso	N/A
Netherlands	Guilder	0.476417
New Zealand	Dollar	0.611300
Norway	Krone	0.145138
Philippines	Peso	N/A
Portugal	Escudo	0.006502
Republic of South Africa	Rand	0.401123

FOREIGN CURRENCIES—Quarter beginning: October 1, 1988 through December 31, 1988 (continued):

Country	Name of currency	U.S. dollars
Singapore	Dollar	$0.490196
Spain	Peseta	0.008119
Sri Lanka	Rupee	0.030301
Sweden	Krona	0.156299
Switzerland	Franc	0.633392
Thailand	Baht (tical)	0.039154
United Kingdom	Pound	1.698500
Venezuela	Bolivar	N/A

(LIQ–03–01 S:COM CIE)

Dated: October 3, 1988.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 88–65)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR SEPTEMBER 1988

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Monday, September 5, 1988.

Greece drachma:

September 1, 1988	$0.066010
September 2, 1988	.006614
September 6, 1988	.006673
September 7, 1988	.006671
September 8, 1988	.006649
September 9, 1988	.006662
September 12, 1988	.006671
September 13, 1988	.006658
September 14, 1988	.006557
September 15, 1988	.006579

FOREIGN CURRENCIES—Daily rates for counteries not on quarterly list for September 1988 (continued):

Greece drachma (continued):

September 16, 1988	$0.006577
September 19, 1988	.006596
September 20, 1988	.006601
September 21, 1988	.006583
September 22, 1988	.006575
September 23, 1988	.006579
September 26, 1988	.006551
September 27, 1988	.006564
September 28, 1988	.006566
September 29, 1988	.006555
September 30, 1988	.006564

South Korea won:

September 1, 1988	$0.013790
September 2, 1988	.001379
September 6, 1988	.001381
September 7, 1988	.001382
September 8, 1988	.001383
September 9, 1988	.001383
September 12, 1988	.001383
September 13, 1988	.001383
September 14, 1988	.001384
September 15, 1988	.001384
September 16, 1988	.001383
September 19, 1988	.001383
September 20, 1988	.001384
September 21, 1988	.001384
September 22, 1988	.001384
September 23, 1988	.001384
September 26, 1988	.001384
September 27, 1988	.001384
September 28, 1988	.001384
September 29, 1988	.001385
September 30, 1988	.001385

Taiwan N.T. dollar:

September 1, 1988	$0.031390
September 2, 1988	.034686
September 6, 1988	.034650
September 7, 1988	.034674
September 8, 1988	.034674
September 9, 1988	.034662
September 12, 1988	.034650
September 13, 1988	.034614
September 14, 1988	.034590
September 15, 1988	.034566
September 16, 1988	.034542
September 19, 1988	.003148
September 20, 1988	.034507
September 21, 1988	.034507

FOREIGN CURRENCIES—Daily rates for counteries not on quarterly list for September 1988 (continued):

Taiwan N.T. dollar (continued):	
September 22, 1988	$0.034507
September 23, 1988	.034507
September 26, 1988	N/A
September 27, 1988	N/A
September 28, 1988	N/A
September 29, 1988	.034507
September 30, 1988	.034507

(LIQ-03-01 S:COM CIE)

Dated: October 3, 1988.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 88-66)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR SEPTEMBER 1988

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 88-52 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Monday, September 5, 1988.

New Zealand dollar:	
September 2, 1988	$0.603000
September 6, 1988	.622700
September 7, 1988	.621000
September 8, 1988	.621500
September 9, 1988	.625000
September 12, 1988	.619200
September 13, 1988	.618000
September 14, 1988	.614800
September 15, 1988	.612500
September 16, 1988	.609000
September 19, 1988	.605500
September 20, 1988	.613000

FOREIGN CURRENCIES—Variances from quarterly rate for September 1988 (continued):

New Zealand dollar (continued):

September 21, 1988	$0.611300
September 22, 1988	.615300
September 23, 1988	.615000
September 26, 1988	.614500
September 27, 1988	.618400
September 28, 1988	.618000
September 29, 1988	.616000
September 30, 1988	.612200

Republic of South Africa rand:

September 14, 1988	$0.406504
September 15, 1988	.406587
September 16, 1988	.045680
September 19, 1988	.404613
September 20, 1988	.404040
September 21, 1988	.404040
September 22, 1988	.402901
September 23, 1988	.402414
September 26, 1988	.401123
September 27, 1988	.401768
September 28, 1988	.402982
September 29, 1988	.402172
September 30, 1988	.400802

Switzerland franc:

September 26, 1988	$0.627510
September 27, 1988	.628615
September 28, 1988	.628931
September 29, 1988	.627668

(LIQ-03-01 S:NISD CIE)

Dated: October 3, 1988.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., October 5, 1988.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 88–16)

Carriers: Business guests of the corporate charterers of a foreign-flag vessel are "passengers" for purposes of coastwise laws.

Date: September 9, 1988
File: VES–3–02 CO:R:P:C
109543 PH/BEW
Category: Carriers

THOMAS J. STADNIK, ESQ.
ASSOCIATE INTERNATIONAL COUNSEL
AMERICAN INTERNATIONAL GROUP, INC.
70 Pine Street
New York, New York 10270

Re: Application of the coastwise passenger law to a foreign-flag yacht chartered by corporations and used to transport business guests of the corporate charterers

DEAR MR. STADNIK:

This in response to your letters of May 16, 1988, in which you request a ruling on the use of a foreign-flag yacht under charter. With your communication of June 29, 1988, you transmitted a copy of the charter party you intend to use. You requested that the terms and information contained in the charter party be kept CONFIDENTIAL and we will do so with regard to the financial information therein.

With regard to the "hypothetical fact scenario" you describe concerning the requirements for obtaining a yacht cruising license under 19 CFR 4.94, we regret that we are unable to issue a ruling with regard to questions which are hypothetical in nature (see 19 CFR 177.7(a)). However, we are making advisory comments on the issues you raise in this regard in the LAW AND ANALYSIS portion of this ruling.

Facts:

You state that your company ("AIG") is a Delaware corporation headquartered in New York and "majority-owned" by United States citizens. AIG is the parent holding company of a worldwide insurance and financial services organization. Keys, Ltd. ("Owner") is a Caymen Islands company which owns the Cayman-flag yacht TEMPTRESS OF CAYMEN ("Yacht"). The Owner holds a valid cruising license for the Yacht.

You state that AIG, on behalf of itself and its subsidiaries, as well as on behalf of an affiliated company ("Charterers") desires to charter the Yacht for one year from the Owner. AIG will execute the charter for itself and for its subsidiaries and affiliate, each of whom will be named in the charter to the charter hire. You state that the Charterers will not enter into any bareboat charter with any third party in or for use in United States waters. The Charterers will choose and pay for a crew. The Yacht will be in use in United States waters during the summer months and it is likely that it will be used in both southern United States and foreign Caribbean waters during the winter months.

You describe the charter arrangement under which the Yacht will be chartered as a bareboat charter. The copy of the charter party which you provided us is denominated a "Bareboat Yacht Charter Agreement." Article 11 of the charter party provides that:

> It is mutually agreed that full authority regarding the operation and management of the yacht is hereby transferred to the Charterer for the term thereof.
>
> In the event, however, that the Charterer wishes to utilize the services of a Captain and/or crew members in connection with the operation and management of the yacht, whether said Captain and/or crew members are furnished by the Owner or by the Charterer, it is agreed that said Captain and/or crew members are agents and employees of the Charterer and not of the Owner.
>
> In the further event that local United States Coast Guard or other regulations require the Owner exclusively to provide a Captain and/or crew, the Owner agrees to provide a Captain who is competent not only in coastwise piloting but in deep sea navigation, and to provide a proper crew. The Captain shall in no way be the agent of the Owner, except that he shall handle clearance and the normal running of the yacht subject to the limitations of this character party. The Captain shall receive orders from the Charterers as to ports to be called at and the

> general course of the voyage, but the Captain shall be responsible for the safe navigation of the yacht, and the Charterer shall abide by his judgment as to sailing, weather, anchorages, and pertinent matters. The Charterer assumes total control and liability as if the Charterer were the owner of the yacht during the term of the Charter.
>
> Notwithstanding any of the foregoing, the Charterer shall have and exercise complete management and control of the yacht, shall be free to hire its own crew, and use the yacht as it see fit.

You state that the Charterers would use the Yacht to entertain insurance brokers, business and financial customers, and other contacts. Occasionally, such persons may be embarked at one United States port and disembarked at a different United States port. The charterers will not charge or accept from any such person any contribution to the expenses of any trip or event undertaken during the term of the charter.

Issue:

Are insurance brokers, business and financial customers, and other contacts of the corporate charterers of a foreign-flag vessel "passengers" for purposes of 46 U.S.C. App. 289?

Law and Analysis:

The Act of June 19, 1986, as amended (24 Stat. 81; 46 U.S.C. App. 289, sometimes called the coastwise passenger law), provides that:

> No foreign vessel shall transport passengers between ports or places in the United States either directly or by way of a foreign port, under a penalty of $200 for each passenger so transported and landed.

For your general information, we have consistently interpreted this proscription to apply to any vessel except a United States built, owned, and properly documented vessel (see 46 U.S.C. 12106 and 12110, 46 U.S.C. App. 883, and 19 CFR 4.80(a)).

In interpreting the coastwise laws as applied to the transportation of passengers, we have ruled that the carriage of passengers entirely within territorial waters, even though the passengers disembark at their point of embarkation and the vessel touches no other point, is considered coastwise trade subject to the coastwise laws. However, the transportation of passengers to the high seas or foreign waters and back to the point of embarkation, assuming the passengers do not go ashore, even temporarily, at another United States point, often called a "voyage to nowhere," is not considered coastwise trade. The carriage of fishing parties for hire, even if the vessel proceeds beyond territorial waters and returns to the point of the passengers' embarkation, is considered coastwise trade subject to the coastwise laws. The territorial waters of the United States consist of the territorial sea, defined as the belt, 3 nautical miles

wide, adjacent to the coast of the United States and seaward of the territorial sea baseline.

We have consistently ruled that yachts or pleasure vessels chartered under a *bona fide* bareboat or demise charter may be used by the character and his guests for pleasure cruising in the United States and between points therein without violating chartered under a charter agreement other than a bareboat charter (e.g., a time charter) to transport the character and/or his guests between coastwise points or in territorial waters would be considered coastwise trade.

It is generally settled law that, "To create a demise [or bareboat charter] the owner of the vessel must completely and exclusively relinquish 'possession, command, and navigation' thereof to the demisee * * * It is therefore tantamount to, though just short of, an outright transfer of ownership. However, anything short of such a complete transfer is a time or voyage charter party or not a charter party at all." (*Guzman* v. *Pichirilo,* 369 U.S. 698, 699–670 (1962); see also, *Leary* v. *United States,* 81 U.S. 607, 611 (1871), and *2B Benedict on Admiralty* (1978 Ed.), 3–9 through 3–13, *Test for Demise Charter.*)

In our review of charter arrangements to determine whether or not they are bareboat charters for Customs purposes, we have generally held, in addition to the above-described generally settled principles, that:

> The nature of a particular charter arrangement is a question of fact to be determined from the circumstances of each case * * * The crux of the matter is whether complete management and control have been wholly surrendered by the owner to the charterer so that for the period of the charter the charterer is in effect the owner. Although a charter agreement on its face may appear to be a bareboat or demise charter, the manner in which its convenants are carried out and the intention of the respective parties to relinquish or to assume complete management and control are also factors to be considered.

In this case, the copy of the charter party which you provided us appears to be bareboat or demise charter agreement on its face. We note, however, that only AIG would be a signatory to the charter party. Only those parties which are signatories to the charter party as charterers have standing as bareboat charterers. Assuming that the manner in which the charter arrangement is carried out is not inconsistent with a bareboat charter, as described above, the charter arrangement under consideration would be considered a bareboat or demise charter with regard to AIG.

Even when a yacht is chartered under a bareboat or demise charter arrangement, the charterers may not use the vessel in the coastwise trade if, as is true in this case, it is not qualified to engage in the coastwise trade. As noted above, 46 U.S.C. App. 289 prohibits the transportation between points in the United States of passen-

gers in a non-coastwise-qualified vessel. "Passenger," for purposes of this provision, is defined as "* * * any person carried on a vessel who is not connected with the operation of such vessel, her navigation, ownership, or business" (19 CFR 4.50(b)). Because there appears to have been some confusion on the interpretation of this provision with regard to the transportation of corporate or business "guests" on a yacht, we have reviewed the earliest rulings in this regard. Based on this review, we have concluded that although a member of the board of directors of a corporate yacht owner (or bareboat charterer) and members of his immediate family would not be considered passengers, business "guests" such as insurance brokers and financial customers would be considered passengers.

Accordingly, the transportation between points in the United States of business "guests" such as insurance brokers, business and financial customers, and other contacts in the Yacht would be prohibited by 46 U.S.C. App. 289 regardless of whether or not the charter arrangement is a bareboat charter. Of course, section 289 would not prohibit the use of the Yacht for the transportation of such passengers in non-coastwise movements (e.g., on "voyages to nowhere" to the high seas, see above, or foreign voyages (but see 19 CFR 4.80a with regard to voyages to "nearby foreign ports")) or the entertainment of such passengers when the vessel remains stationary at its moorage.

We offer the following general comments on yacht cruising licenses. Cruising licenses may be issued, on a reciprocal basis, to pleasure vessels of the foreign countries listed in 19 CFR 4.94(b). A vessel which has a cruising license is exempt from the requirements for vessel entry (see 19 U.S.C. 1435; 19 CFR 4.2), except for entry on its first arrival before it has a cruising license, vessel clearance (see 46 U.S.C. App. 91; 19 CFR4.60 *et seq.*), and vessel permits to proceed between United States ports (see 46 U.S.C. App. 313–315; 19 CFR 4.80 *et seq.*). A cruising license does *not* exempt a vessel from the requirement to report its arrival (see 19 U.S.C. 1433; 19 CFR 4.2). We emphasize that although cruising licenses exempt yachts having them from the above described requirements while cruising in the United States, they are *not* required as a condition precedent to cruising in the United States or its waters.

Pursuant to 46 U.S.C. App. 104 and 19 CFR 4.94, an application for a cruising license is to be filed with Customs by the vessel owner or master. Since a bareboat charterer is treated as the owner *pro hac vice* during the term of the charter, a bareboat charterer or his master could apply for a cruising license.

Only yachts which are "used and employed exclusively as pleasure vessels" (see 46 U.S.C. App. 104) may be granted cruising licenses. A yacht used under a "time" or similar charter would not be considered to be used exclusively as a pleasure vessel and could not be granted a cruising license. Since the use of yacht to transport business "guests" would be considered an engagement in trade

(coastwise trade if the passengers are transported between coastwise points), a yacht so used could not be granted a cruising license.

You should be aware that a yacht or pleasure boat owned by a resident of the United States or brought into the United States for sale or charter to a resident thereof is dutiable at the rate of 1.5 percent *ad valorem*, under item 696.05 or 696.10, Tariff Schedules of the United States.

Holding:

Business guests such as insurance brokers, business and financial customers, and other contacts of the corporate charterers of a foreign-flag vessel are "passengers" for purposes of 46 U.S.C. App. 289, and their transportation between coastwise points or on a "voyage to nowhere" solely in United States territorial waters would be prohibited by that statute.

(C.S.D. 88–17)

Entry/Liquidation: Insufficient evidence provided by protestent to substantiate reduced value of merchandise.

Date: August 11, 1988
File: LIQ–9–01–CO:R:C:E
220672 MS
Category: Entry/Liquidation

AREA DIRECTOR
New York Seaport

Re: Protest 1001–8–001850
Bon Jour International

Facts:

This protest and application for further review are filed against your denial of the importer's request to reliquidate the entry under section 520(c)(1) of the Tariff Act of 1930, as amended, (19 U.S.C. 1520(c)(1)). The importer claims that a mistake of fact existed, whereby the imported goods were erroneously appraised at $6.30 per piece, rather than $1.50 per piece.

The entry was made November 7, 1983. The importer notified Customs by a letter dated November 11, 1984, that the merchandise, originally valued on the entry for $6.30 each, was defective due to incorrect sizing, non-conforming specifications, improper stitching and pressing, and improper use of labels. The importer also enclosed a September 14, 1984, letter from a banking corporation who apparently held title to the imported merchandise, advising the importer that the purchase price had been reduced to $1.50 each for specified styles and stated that the importer had "indicated

acceptance" of that price. No information in the letter identified this price with the particular entry in question. The district director liquidated the entry July 17, 1986 at the rate of $6.30 each.

A claim under 19 U.S.C. 1520(c)(1) was filed December 17, 1986 and denied January 22, 1988. In the letter denying the section 1520(c)(1) claim, in addition to checking the boxes on the form reaffirming the original liquidation determination, the Customs official stated that the "Import specialist lacks proof of the styles receiving discount, how much was given, etc. Import specialist feels this issue is more properly addressed under Section 514." This protest was filed February 24, 1988 in response to the denial.

Issue:

Whether the appraised value of imported merchandise claimed to be defective may be corrected under 19 U.S.C. 1520(c)(1), as a mistake of fact, when the importer provided information concerning the defects and reduced value prior to liquidation.

Law and Analysis:

Section 1520(c)(1) authorizes reliquidation for errors caused by a clerical error, mistake of fact, or inadvertence not amounting to an error in the construction of a law. T.D. 54848 describes mistake of fact as that when a person believes the facts to be other than they really are and takes action based upon that erroneous belief. In certain circumstances described in C.S.D. 81–144, when merchandise is found to be defective after liquidation, Customs officers are authorized to reliquidate the entry under section 1520(c)(1) as a mistake of fact.

In this case, the claimed defects in the goods were discovered and reported to Customs before liquidation occurred. Documents concerning the defective goods and the reduced price of the merchandise were provided to Customs prior to the time the value was determined. The Customs Area Director states that the protestant did not provide sufficient documentary evidence to support the claim of defective goods and did not submit adequate proof of purchase at the reduced value. There is no evidence that the "responsible Customs officials were unaware that the files contained the correct price", as the protestant contends.

No additional relevant facts became known to Customs or the importer after liquidation. Nor is there any indication of inadvertence or oversight by Customs in its consideration of the protestant's evidence of defective merchandise and corresponding reduced value. Rather, Customs evaluated all the evidence submitted and determined that the merchandise should be valued at the higher dollar amount shown on the original entry documents. Essentially, the protestant disputes Customs' determination that the evidence was insufficient to liquidate the entry at the lower value.

The protestant's request to reliquidate the entry at a reduced value is a request to correct an error of judgment on the part of the

Customs official, which is a mistake in the application of law. *United China & Glass Co.* v. *United States* 6 Cust. Ct. 207, C.D. 4191 (1971), *Fibrous Glass Products, Inc.* v. *United States*, 63 Cust. Ct. 62, C.D. 3874 (1969). Mistakes of judgment are remedied by the filing of a protest within 90 days after liquidation, under 19 U.S.C. 1514. No such protest was timely filed.

Holding:

Customs conclusion that insufficient evidence was provided by the protestant to substantiate reduced value of the merchandise is not a mistake of fact correctible under 19 U.S.C. 1520(c)(1). You are directed to deny the protest in full.

(C.S.D. 88–18)

Valuation: The dutiability of repair costs included in a contract concerning concrete panels.

Date: August 18, 1988
File: CLA–2 CO:R:C:V
544005 DHS
Category: Valuation

DISTRICT DIRECTOR OF CUSTOMS
Ogdensburg, N.Y. 13669

Re: Response to internal advice request regarding the dutiability of repair costs.

DEAR SIR:

This is in response to your request for internal advice, dated August 18, 1987, regarding the dutiability of repair costs included in a contract between Company "A" (hereinafter referred to as "A"), and Company "B" (hereinafter referred to as "B").

Facts:

The products in question are concrete panels manufactured in Canada and erected in the United States as part of "A's" contract with "B".

The original contract price for manufacturing, delivering and installing the panels was $550,000. The final amount paid by the importer for the panels was $594,243.97. Estimated costs for supervision, installation, hardware and water repellant, freight, supervision, installation, hardware and water repellant, freight, brokerage, caulk, jockeying, state sales tax, duty and repairs were all below the actual final costs. You state that Customs has permitted the deductions of all of these elements at their actual costs except the repair costs. These items are not at issue in the subject internal advice.

The value of the estimated repairs to the panels reported to Customs under the original contract in question was $6,000. The actual cost incurred for such repairs after the importation of the merchandise was $19,000. It is alleged by the importer and the import specialist that the repairs done at the site in the United States would rarely if ever be separately identified in the contracts between the parties. The importer states that in purchase and construction contracts of this type it is the seller, not the buyer who assumes the risks of unanticipated costs. The original contracts of the parties reflect bids by the seller in which they have calculated and estimated their costs, expenses and profits but have not conveyed these breakdowns to the buyer. Estimates and final actual contract breakdowns however, are supplied to Customs by the seller.

Issue:

Are the subject repair costs separately identified from the price actually paid or payable?

In making this determination should the estimated or actual costs be applied?

Law and Analysis:

The undisputed method of appraisement is transaction value pursuant to section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401). Section 402(b)(3)(A)(i) provides:

> The transaction value of imported merchandise does not include any of the following, if identified separately from the price actually paid or payable * * *:
>
> (A) Any reasonable cost that is incurred for—"(i) the construction, erection, assembly, or maintenance of, or the technical assistance provided with respect to, the merchandise after its importation into the United States; * * *

In Customs Ruling Number 543567, dated January 17, 1986, a contract existed between the United States buyer and a manufacturer/importer of precast concrete panels to supply and install the panels in the United States. Repair work was provided to the damaged panels at the construction site in the United States. Section 402(b)(3)(A)(i) was applied by Customs recognizing that the repair costs were incurred in the United States but denied the deductions from the "price actually paid or payable" since nothing was submitted by the parties which separately identified the repair costs from the price actually paid or payable for the imported goods. This lack of distinction was further evidenced by the language in the contract between the foreign manufacturer/importer and the United States buyer which provided that the former "shall *without charge,* replace any material and correct any workmanship found by the (buyer) not to conform to contract requirements * * *" (emphasis added).

It is the view of the importer and the concerned import specialist that the repair costs relate to the importation and disposition in the United States and not to the purchase price of the merchandise; therefore, the law permits a deduction from the contract price of the costs to the seller in arriving at the transaction/dutiable value.

Based upon the nature of these transactions, we find that the costs incurred for the repair work provided to the panels is such that the subcontractor would not submit the costs in their bid to the buyer. The completed contract is not only for the imported merchandise but for the installation of this merchandise. Indicative of such contracts is the requirement that a finished product is provided to the buyer in a final and undamaged condition. Even though the repair costs are not capable of determination prior to importation and installation, estimates of the repair charges based upon the subcontractor's past experience in this field have been provided to the Customs Service by the seller displaying that the repair costs have been taken into consideration in the final cost of the overall project. These costs submitted to Customs for purposes of entry are reasonable and are sufficient to fulfill the requirements of identifying separately the charge from the price actually paid or payable for the imported goods as provided in section 402(b)(3).

Finally, the importer alleges that the actual costs and not the estimated costs are the appropriate amounts to deduct. We are of the opinion however, that the estimated costs provided to Customs as part of the entry package, if reasonable, are the proper charges to be applied since these were the charges that are separately identified from the price actually paid or payable. Under the circumstances presented, there is no basis upon which to distinguish the actual repair costs from the final transaction value for the imported merchandise.

Holding:

Based upon the foregoing, we conclude that the estimated cost of the repairs provided to Customs at the time of entry is separately identified from the price actually paid or payable for the imported merchandise and should not be included in the transaction value.

(C.S.D. 88–19)

Valuation: The existence or non-existence of a bona-fide buying agency relationship.

Date: August 17, 1988
File: CLA–2 CO:R:C:V
544008 DHS
Category: Valuation

AREA DIRECTOR OF CUSTOMS
Detroit, Michigan

Re: Decision of application for further review of Protest No. 3801–6–001587

DEAR SIR:

The above-referenced protest and application for further review concerns whether a bona-fide buying agency exists and whether commissions paid to the foreign corporation are non-dutiable buying commissions.

Facts:

The importer has submitted a buying agency agreement as well as documentation from the foreign corporation denying the request of the importer to present a copy of the invoice from the manufacturer or seller. There has not been any evidence submitted which describes the relationships of the parties involved or the duties and responsibilities of each.

Issue:

Is the submission of a buying agency agreement without the existence of other evidence sufficient to find a buying agency relationship?

Law and Analysis:

Transaction value is defined in section 402, Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a), as the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts for the items specifically enumerated in section 402(b)(1) fo the TAA. Although selling commissions are one of the items listed therein, buying commissions are not included as an item to be added to the price actually paid or payable. While buying commissions cannot be added to the price actually paid or payable, neither may they be deducted if the price actually paid or payable includes a buying commission. The term "price actually paid or payable" is defined in section402(b)(4)(A) as:

> * * * the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

It is clear from the statutory language that in order to establish transaction value one must know the identity of the seller and the amount actually paid or payable to him. Whether or not the purported agent is the seller is to be determined by the documents presented. Furthermore, the totality of the evidence must demonstrate that the purported agent is in fact a bona fide buying agent

and not a selling agent or an independent seller. See TAA No. 7, dated September 29, 1980 (542141).

The burden is placed upon the importer to prove the existence of a bona fide agency relationship and that the charges paid were, in fact, bona fide buying commissions. *B & W Wholesale Co.* v. *United States,* 58 CCPA 92, C.A.D. 1010, 436 F.2d 1399 (1971); *New Trends, Inc.* v. *United States,* 10 CIT ——, 645 F. Supp. 957 (1986); *J.C. Penney Purchasing Corporation et al* v. *United States,* 80 Cust. Ct. 84, C.D. 4741 (1978), 451 F. Supp. 1008, AA.R.D. 251 (1969). If plaintiff does not clearly establish that such a relationship existed, then the relationship is not that of an agency. *Globemaster Midwest, Inc.* v. *United States,* 67 Cust. Ct. 539, R.D. 11758, 337 F. Supp. 465 (1971). The failure to produce documentary evidence of a transaction which is normally reduced to writing, and that would be indicative of agency status weakens the probative value. *A & A Trading Corp.* v. *United States,* 65 Cust. Ct. 785, A.R.D. 276 (1970).

The importer relies upon the submission of the buying agency agreement to support his contention that an agent/principal relationship exists. No further evidence has been offered to support this contention.

It is well settled that a bona fide agency agreement is not dispositive of the determination that a bona fide buying agency exists. *New Trends, Inc.* v. *United States,* supra. The buying agency agreement is only evidence that the parties intended to create an agency relationship. The agreement must be supported by sufficient evidence. *Rosenthal-Netter, Inc.* v. *United States,* 12 CIT ——, Slip. Op. 88–9 (1988). In *Hub Floral Mfg.* v. *United States,* 60 Cust. Ct. 950, R.D. 11544 (1968), the court noted that "Acts may support, or they may cast doubt upon, the words which parties speak or reduce to writing." Accordingly, in the absence of evidence demonstrating that the party did, in fact, operate as a buying agent, we see no basis for providing relief.

Holding:

In view of the foregoing, we are unable to find that a buying agency exists. The importer has the burden of proving the existence of a principal-agent relationship and he has failed to provide sufficient evidence to meet this burden. Therefore, we hold the commissions in question to be dutiable. Accordingly, you are directed to deny the protest in accordance with the terms of this decision. A copy of this decision should be attached to the Customs Form 19 to be sent to the protestant.

(C.S.D. 88–20)

Valuation: The dutiability of machinery and equipment consigned by the importer to its related company in Mexico for use in the production of the importer merchandise.

Date: August 16, 1988
File: CLA–2 CO:R:C:V
544083 EK
Category: Valuation

DISTRICT DIRECTOR OF CUSTOMS
Laredo, Texas

Re: Response to Internal Advice No. 66/87.

DEAR SIR:

This is in response to your memorandum requesting internal advice as to the dutiability of certain equipment consigned by a domestic division of (Corporation Name) (hereinafter referred to as importer) to its related company in Mexico.

Facts:

The importer states that certain equipment is consigned, free of charge, to its wholly owned subsidiary in Mexico to produce steering wheels and instrument panel pads. The equipment in question is described by the importer as follows:

1. Two different types of dryers which are used to remove excess surface moisture from vinyl resin pellets prior to being loaded into an extrusion molding machine for the production of vinyl sheets. One dryer is used to force heated air through the pellets. The second dryer uses compressed air to dry the pellets so that no moisture is present when the vinyl resin enters the extrusion mold. The vinyl sheets are later transferred to an injection mold where they are formed into an instrument panel pad (IP).

2. A high pressure washer used to wash dirt, oil, processing residues and other contaminants from IPs after their production is complete and prior to packaging and shipment.

3. A bulk storage tank used to store polyol, a liquid foam material, used in the assembly of IPs. During the manufacture of IPs, polyol is pumped from the tank to a mold which holds the vinyl sheet in the upper portion and the insert in the lower portion.

4. Paint booths which are enclosed sheet metal structures equipped with exhaust systems which allow the IPs and steering wheels to be painted in an environment free of dust and dirt.

5. Air compressors which are used to supply compressed air at approximately 100 lbs/square inch throughout the plant. The compressed air is used to operate various machinery and equipment throughout the plant.

6. A conveyor system which is used to transport raw materials from storage areas to the first point of usage in the plant. A second

conveyor is used to move the article being produced from one point in the manufacturing process to another.

The final imported product in this case is appraised pursuant to computed value, section 402(e) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a(e)).

Issue:

Whether the machinery and equipment consigned by the importer to its wholly owned subsidiary in Mexico is properly included in the computed value of the final imported product.

Law and Analysis:

As indicated above, the merchandise is appraised pursuant to computed value. Under computed value, the value of any assist will be added if its value is not included under section 402(e)(1)(A) or (B) or the TAA. Included in the definition of assists are "tools, dies, molds, and *similar items used in the production* of the imported merchandise." *See,* section 402(h)(1)(A)(ii). (emphasis added).

In TAA #18 dated February 27, 1981, equipment which was not used in the production of the imported merchandise was not considered to be an assist within the meaning of section 402(h)(1)(A)(ii). These items included telephone switching equipment, an emergency generator, air conditioning equipment and a power transformer. This equipment was contrasted with what was called "general purpose equipment" such as sewing machines, ovens, drill presses, etc., which was actually used in the production of the merchandise and held to be dutiable as assists. This position was also followed in Headquarters Ruling No. 542762 dated January 14, 1983.

With respect to the instant case, the equipment in question is not used in the actual production of the imported merchandise within the meaning of the section 402(h)(1)(A)(ii) of the TAA or the above-cited rulings.

Please note, however, that the issue of whether the items are assists in secondary to the question of whether the equipment should be included under computed value as the "cost or value of the materials and the fabrication and other processing of any kind employed in the production of the imported merchandise" or "an amount for profit and general expenses * * * made by the producers in the country of exportation for export to the United States." *See,* section 402(e)(1)(A) and (B) of the TAA. If, in accordance with generally accepted accounting principles of the country of production or exportation, the costs of this equipment should be reflected in the books of the foreign assembler as processing costs, then it may be that the costs are to be included in determining the computed value of the final imported product. *See,* TAA #9 dated October 15, 1980.

Holding:

In view of the foregoing, the equipment in question is not encompassed by the definition of assists in section 402(h)(1)(A)(ii) of the

TAA. The issue regarding whether the costs are to be included in the computed value of the final imported product must be determined according to generally accepted accounting principles.

(C.S.D. 88-21)

Valuation: The dutiability of $5 Customs fee for the processing of commercial trucks arriving in the U.S.

Date: August 11, 1988
File: CLA-2 CO:R:C:V
544215 CW
Category: Valuation

MR. WILLIAM C. CAIN
CAIN CUSTOMS BROKERS, INC.
Progreso International Bridge
P.O. Box 10
Progreso, Texas 78579

Re: Dutiability of $5 Customs fee for the processing of commercial trucks arriving in the U.S.

DEAR MR. CAIN:

This is in response to your letter of June 30, 1988, in which you request a ruling concerning the dutiability of the $5 fee payable to the Customs Service for services provided in connection with the arrival of a commercial truck.

Facts:

You state that you represent several growers of fresh okra in Mexico who have entered into contracts with U.S. freezing plants for the purpose of okra on a fixed price pound basis. The contracts provide that for the growers to receive the purchase price, they must deliver the okra to the purchasers' facilities in the U.S. You advise that in delivering the okra to the U.S. purchasers, the growers are required to pay the $5 Customs processing fee upon the arrival of each truck at the U.S. port of entry. Under these circumstances, you maintain that the $5 fee should be deductible from the purchase price as a non-dutiable charge in determining the appraised value of the imported okra.

Issue:

Whether the $5 Customs fee collected upon arrival of a commercial truck containing fresh okra from Mexico is included in the appraised value of the imported okra where the terms of sale are CIF U.S. purchaser's plant.

Law and Analysis:

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. 99–272) establishes a schedule of fees chargeable to users of various services provided by the Customs Service in connection with the processing of persons, aircraft, vehicles, vessels, and merchandise arriving in the U.S. Section 13031(a)(2) of Pub. L. 99–272 specifically authorizes Customs to collect $5 upon the arrival of a commercial truck at a U.S. port of entry. Section 24.22(c)(2), Customs Regulations (19 CFR 24.22(c)(2)), states that the $5 fee shall be collected from the driver or other person in charge of the commercial truck.

We are assuming for purposes of this ruling that the imported okra will be appraised on the basis of transaction value, the primary basis of appraisement under the valuation statute, section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA). Transaction value is defined in section 402(b) of the TAA as "the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts" for certain specified items if they are not already included in that price. The words "price actually paid or payable" are defined in section 402(b)(4)(A) of the TAA as:

> * * * the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller.

In a ruling dated November 10, 1986 (543842), this office addressed the issue of the dutiability of the merchandise processing user fee, which is an ad valorem fee established by the Omnibus Budget Reconciliation Act of 1986 (Pub. L. 99–509). We concluded that where the overall transaction price between the buyer and foreign seller for imported merchandise includes the user fee, the fee would not be considered to be part of "the price actually paid or payable for the merchandise." Therefore, we held that, under these circumstances, the fee would not be dutiable as part of transaction value.

Similarly, we believe that in a situation in which the overall purchase price for imported merchandise includes the $5 Customs fee payable upon the arrival of a Commercial truck (*e.g.*, a CIF U.S. delivered price), the fee would not form part of the "price actually paid or payable," as those words are defined in section 402(b)(4)(A) of the TAA.

Holding:

Under circumstances in which the terms of sale between a Mexican grower and a U.S. purchaser for imported okra require that the

grower incur all costs necessary to deliver the produce to the U.S. purchaser's plant (a CIF U.S. delivered price), then the $5 commercial truck processing fee paid by the grower in connection with the imported okra would not be dutiable as part of transaction value.

(C.S.D. 88–22)

Valuation: The dutiability of equipment, supplied by the importer, which is not used in the production of the imported merchandise. The salary paid to a U.S. employed manager residing in Mexico, not an assist.

Date: August 17, 1988
File: CLA–2 CO:R:C:V:
544216 DHS
Category: Valuation

WILLIAM F. JOFFROY, JR.
WILLIAM F. JOFFROY, INC.
P.O. Box 698
Nogales, Arizona 85628–0698

DEAR MR. JOFFROY:

This is in response to your letter of July 19, 1988, requesting a ruling as to whether certain costs will be considered by Customs as dutiable assists pursuant to section 402(h) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a).

Facts:

You indicate that your client will be assembling certain electrical connectors in Mexico and importing them into the United States under item 807.00, Tariff Schedules of the United States (TSUS).

You state that many fixed assets that are purchased in the United States by the importer are to be provided to the Mexican assembly operation for use in the shipping/receiving department, the general offices, the employees' workstations and for the purpose of supplying air to the plant. You indicate that this equipment is not to be used in the production of the merchandise to be imported into the United States.

You state that the importer has assigned one of its United States employees to be the general manager of the assembly plant in Mexico for the purpose of managing and directing the overall operations. He will be compensated from the importer in the United States, but will reside in Mexico.

Issues:

Whether equipment, supplied free of charge by the importer, which is not used in the production of the imported merchandise, is considered an assist.

Whether compensation to be paid to a general manager by the importer for services performed at a foreign assembly plant constitute an assist.

Law and Analysis:

The definition of an assist, as set forth in section 402(h)(1)(A) of the Tariff Act is:

> * * * any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:
>
> (i) Materials, components, parts, and similar items incorporated in the imported merchandise.
>
> (ii) Tools, dies, molds and similar items used in the production of the imported merchandise.
>
> (iii) Merchandise consumed in the production of the imported merchandise.
>
> (iv) Engineering, development, art work, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

You inquire as to the dutiability of equipment consisting of air compressors, various scales, forklift trucks, carts, containers, tape dispensers, dock loading lite, JIB lift, personal computers, office equipment and copiers, board marker, matrix printer, eye wash station, work benches and stools, plugs and socket air drops. You state that this equipment will not be utilized in the production of the imported merchandise but in the operation of other areas of the assembly plant.

In Customs Headquarters Ruling Letter 542122, dated September 4, 1980 (TAA No. 4), we held that general purpose equipment, such as sewing machines, ovens, drill presses, etc., furnished free of charge or at a reduced cost and used abroad in the production of merchandise imported into the United States, is dutiable under section 402(h)(1)(A)(ii). However, in Customs Headquarters Ruling Letter 542302, dated February 27, 1981 (TAA No. 18), Customs concluded that air conditioning equipment, a power transformer, telephone switching equipment and emergency generators did not fall within the definition of an assist, since they were not used in the production of the merchandise.

Since the equipment listed above is not used in the production of the imported merchandise but is used to operate the other areas of the assembly plant, the equipment is not an assist within the meaning of section 402(h)(1)(A) of the Tariff Act.

With respect to the management services described above, it has consistently been the position of the Customs Service that management services of this type are not considered assists. See, TAA Nos. 4, 20, 46 and Headquarters Ruling Nos. 543820 dated December 22, 1986, and 543877 dated March 17, 1987.

Holding:

In reference to the case before us, we conclude in accordance with the holdings of the cases cited above that the equipment does not fall within the definition of an assist, since it is not used in the production of the merchandise. Further, we conclude that the salary paid to the U.S. employed manager, who is residing in Mexico, is not an assist. Please note that no information has been provided and this ruling does not address the issue of the applicability of transaction value as a method of appraisement.

(C.S.D. 88–23)

Marking: Country of origin marking of U.S. origin earrings painted in Canada.

Date: August 12, 1988
File: MAR 2–05 CO:R:C:V
729308 LR
Category: Marking

JUDY BRADT
CANADIAN EMBASSY
2450 Massachusetts Ave., NW.
Washington, DC 20008–2881

Re: Country of origin marking requirements for earrings manufacturered in the U.S. and painted in Canada.

DEAR MS. BRADT:

This ruling is in response to your letter submitted on behalf of Polyn Inc. (the Company) requesting a ruling on the marking requirements of earrings imported from Canada.

Facts:

The Company purchases unpainted earrings in the U.S. and ships them to Canada where they are painted a solid color and re-exported to the U.S. (Although not specifically stated, we assume that the earrings are made in the U.S.) The painted earrings are shipped to the U.S. loose in bags. The U.S. purchaser pairs the earrings, puts them on cards and attaches butterfly clasps so that they may be worn by women with pierced ears. Samples of the unpainted and painted earrings have been submitted.

Issue:

Whether U.S.-made earrings which are sent to Canada for painting have to marked as a product of Canada.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that every article of foreign origin (or its container) imported into the U.S., subject to certain specified exceptions, shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. U.S. products exported and returned are specifically excepted from country of origin marking requirements under section 134.32(m), Customs Regulations (19 CFR 134.32(m)). In applying this section, Customs has ruled that products of the U.S. which are exported and returned are generally not subject to the country of origin marking unless, prior to their return, they are substantially transformed. *See* HQ 729519, dated May 18, 1988, in which this principle is restated.

In order for a substantial transformation to be found, an article having a new name, character, or use must emerge from the processing. *See United States* v. *Gibson-Thomsen Co. Inc.,* 27 C.C.P.A. 267, C.A.D. 98 (1940).

Customs has not previously ruled on whether the painting of earrings constitutes a substantial transformation for marking purposes. However, in HQ 071362, dated June 23, 1983, and HQ 071363, dated August 25, 1983, two cases involving a substantial transformation question relevant to the determination of whether certain toy figures and plastic figures were eligible for benefits under the Generalized System of Preferences (GSP), Customs found that the painting of the figures did not constitute a substantial transformation. In another marking case involving painting (HQ 707057, dated December 10, 1976), Customs ruled that hand painting and firing of a vase did not constitute a substantial transformation so as to change the country of origin. Finally, in *Madison Galleries, Ltd.* v. *United States,* Slip Op. 88–71 (June 7, 1988), a recent court case involving the issue of whether certain vases were eligible for the benefits of GSP, the Court of International Trade determined that the vases were substantially transformed when they were decorated with oriental designs and scenes through painting and firing, which steps were repeated to provide surface relief and a multi-dimensional effect to the depictions. The cost of such processing equaled or exceeded 35 percent of the appraised value of the pieces. It is noted that this case is now on appeal.

Based on the above determinations, we are of the opinion that the painting of the earrings in Canada does not change the name, character, or use of the earrings in question. While painting is certainly necessary before the earrings can be sold to the consumer, we find

that it is a minor finishing operation which leaves the fundamental identity of the earrings intact. Unlike the painting in the *Madison Galleries* case which produced a highly decorative article with artistic qualities, the earrings here are painted a solid color and lack any artistic and decorative effects. Moreover, while no cost figures have been submitted, it does not appear that the painting significantly increases the value of the earrings.

Holding:

Based on the above considerations, we find that the painting of the earrings in Canada does not constitute a substantial transformation. As such, if the earrings are made in the U.S. they are excepted from marking pursuant to 19 CFR 134.32(m).

(C.S.D. 88-24)

Marking: Country of origin marking of baby booties.

Date: September 6, 1988
File: MAR-2-05 CO:R:C:V
730910 LW
Category: Marking

MR. JAMES W. LAWLESS
C. H. POWELL COMPANY
One Intercontinental Way
Peabody, Massachusetts 01960

Re: Country of origin marking requirements for baby booties.

DEAR MR. LAWLESS:

This is in response to your letter of November 24, 1987, on behalf of Kiddie Products Inc. (the importer), requesting a ruling on country of origin marking requirements for imported baby booties and similarly marked items from Taiwan, Hong Kong, South Korea, and Malaysia. You state that the importer has received marking notices from Customs in Boston and would like clarification of the marking requirements.

Facts:

Each pair of booties is sold in a disposable package which will reach the consumer unopened. The front of the package is clear so that the booties are visible. The back of the package has a description of the booties, the fiber content, and cleaning instructions. Towards the bottom of the back of the package under the heading "Tested and Guaranteed," the second paragraph reads "This product meets all of The First Years quality standards and has been

made to our specifications in Korea. Under this paragraph appears the U.S. address "Avon, MA 02322."

Issue:

Whether indicating the country of origin in this manner complies with country of origin marking requirements?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit in such a manner as to indicate to the ultimate purchaser the English name of the country of origin of the article.

Marking the country of origin on the package rather than the booties themselves complies with section 134.23(d)(2), Customs Regulations (19 CFR 134.24(d)(2)), which provides that disposable containers or holders of imported merchandise, which are sold without normally being opened by the ultimate purchaser, shall be marked to indicate the country of origin of their contents.

While it is acceptable to mark the package rather than its contents, the marking regulations also reflect a concern that the ultimate purchaser in the U.S. must be able to find the marking easily and read it without strain. See section 134.41(b), Customs Regulations (19 CFR 134.41(b)).

In addition, in a case such as the one at hand, when the name of any city or locality in the U.S., other than the country or locality in which the article was manufacturered or produced, appears on an imported article or its container, there shall appear, legibly and permanently, in close proximity to such words, letters or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning. See section 134.46, Customs Regulations (19 CFR 134.46). The purpose of this section is to prevent the possibility of misleading or deceiving the ultimate purchaser.

Holding:

While the country of origin on the sample submitted is marked in close proximity to the U.S. address in letters of comparable size and in this respect complies with 19 CFR 134.46, it is our opinion that because the country of origin is mentioned at the end of a sentence concerning quality standards, the country of origin is not readily visible to the ultimate purchaser. It is feasible to indicate that the booties meet the importer's quality standards without placing the country of origin information within the same sentence. In addition, the words "made to our specifications in Korea" do not clearly directly indicate the consumer the country of origin as do the words, suggested in 19 CFR 134.46, "Made in," or "Product of."

To comply with the country of origin marking regulations the country of origin should be set apart from the product's qualifications in close proximity to the U.S. address preceded by a phrase such as "Made in," "Product of," or other words of similar meaning. For example, printing "Made in Korea" below the U.S. address in letters of comparable size, would comply with country of origin marking requirements.

(C.S.D. 88-25)

Marking: Country of origin marking of a kit containing twelve computer tools.

Date: September 7, 1988
File: MAR-2-05 CO:R:C:V
730927 LW

MS. MARIAN R. SHELTON
GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN
12 East 49th Street
New York, NY 10017

DEAR MS. SHELTON:

This is in reply to your letter of November 16, 1987, on behalf of Curtis Manufacturing, Inc. (the importer), requesting clarification of Customs Ruling 730567, dated August 26, 1987, which concerned the country of origin marking requirements for a kit containing twelve computer tools.

The kits and tools are made in Taiwan, and are packaged in a cardboard sleeve, and shrink-wripped in clear plastic. The country of origin will appear on the back side of the cardboard sleeve beneath the U.S. address of the manufacturing company. You state that the cardboard sleeve includes a picture of the tools in an open case, which you believe will further indicate to the ultimate purchaser that both the kit and the tools were made in Taiwan. The importer would like to indicate the country of origin of the kit and the computer tools with the phrase "Made in Taiwan," rather than "Tools and Case Made in Taiwan," as required by Ruling 730567.

Because there are no markings or phrases on the container which may mislead the ultimate purchaser as to the country of origin, it is our opinion that marking the cardboard sleeve with the phrase "Made in Taiwan" will inform the ultimate purshaser that both the kit and the tools are made in Taiwan. Ruling 730567 is modified accordingly.

(C.S.D. 88–26)

Marking: Country of origin marking of patient identification bracelets.

Date: August 11, 1988
File: MAR–2–05 CO:R:C:V
730945 JD
Category: Marking

J. MARK HOLLAND, ESQ.
HUBBARD, THRUMAN, TURNER & TUCKER
2100 One Galleria Tower
Dallas, Texas 75240–6604

Re: Country of origin marking requirements for patient identification bracelets.

DEAR MR. HOLLAND:

This is in reply to your letter of December 7, 1987, concerning the country of origin marking requirements applicable to patient identification bracelets.

Facts:

According to your submission, your client manufacturers patient identification bracelets in the U.S. You state there are various uses for this product and mention one use, namely, placing it on a patient's wrist when they are admitted to a hospital.

One of your client's competitors imports similar bracelets from Taiwan. These bracelets are imported in boxes, two sides of each box bearing a label with the name and address of a company in Kansas. On a third side of each box, a label reading "Made in Taiwan" is affixed. The two labels with the U.S. address are affixed directly to the box while the country of origin label is attached after the box is shrink-wrapped.

Issues:

Who is the ultimate purchaser, for country of origin marking purposes, of patient identification bracelets?

If a box containing foreign articles has two labels bearing a U.S. address affixed to two separate panels and has a country of origin label affixed to a third and different panel, is that marking in compliance with 19 U.S.C. 1304?

What if that same box has the U.S. address labels affixed directly to it but has the country of origin label affixed after the box is shrink-wrapped?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or

container) will permit in such a manner as to indicate to the ultimate purchaser the English name of the country of origin of the article. Section 134.1(d), Customs Regulations (19 CFR 134.1(d)), defines ultimate purchaser as "generally the last person in the U.S. who will receive the article in the form in which it was imported."

Section 134.46, Customs Regulations (19 CFR 134.46), requires that in any case in which the words "U.S.", or "American", the letters "U.S.A.", any variation of such words or letters, or the name of any city or locality in the U.S., or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, there shall appear legibly and permanently, in close proximity to such words, letters, or name, and in at least comparable size, the name of the country of origin preceded by "Made in", "Product of", or other words of similar meaning. To be considered "in close proximity", the country of origin information must be visible simultaneously with the reference to the place other than the country of origin, without any manipulation of the article or container.

We can find no prior rulings determining who is the ultimate purchaser of patient identification bracelets. However, some precedent exists for analogous items or hospital equipment.

Disposable hospital paper shoe covers, head covers, drape sheets, gowns, towels and other similar products were not required to be individually marked after a finding that the hospital was the ultimate purchaser of such items. Therefore, only the outer containers reaching the hospital needed to be marked to indicate country of origin (715640 FBO; June 16, 1981). In the case of surgical masks, only the dispenser box need be marked to indicate the country of origin. This was because it was determined that hospitals or doctors' offices were the ultimate purchasers (723745 HL; February 6, 1984). Hospitals were found to be the ultimate purchasers of surgical gloves, therefore exempting individual packages from country of origin marking. Only the outer case need bear country of origin marking (730840 jd; January 12, 1988).

We liken the subject patient identification bracelets to the disposable hospital equipment mentioned above. For example, in both the case of disposable drape sheets or gowns and patient identification bracelets, the item comes in close physical contact with the patient but the patient never "receives" the item as that word is used in the regulations. The patient is the passive recipient of the intended end use of the bracelets but it is some hospital employee, as an agent of the hospital, who is actively using the item, that use being to inscribe the bracelet with vital information concerning the patient and snap it on the patient's wrist where it will be readily accessible to hospital staff. Accordingly, it is the hospital that is the last entity to receive the item in the form in which it was imported.

To our knowledge, the bracelets are not reuseable and serve no useful purpose once a patient's hospital stay has ended.

The distinction between active user or passive recipient is borne out by a precedent we located concerning disposable toothbrushes included in hospital patient admission kits. Such toothbrushes were required to be individually marked after a finding that the patient, not the medical supply company assembling the kit, nor the hospital supplying the kit, was the ultimate purchaser (708375 AB; March 17, 1987). Clearly it was the individual patient who would be receiving the toothbrush and actively putting it to its intended end use.

In light of the fact that hospitals are the ultimate purchasers of patient identification bracelets, the bracelets are exempt from individual marking pursuant to § 134.32(d), Customs Regulations (19 CFR 134.32(d)), provided the outermost containers reaching the ultimate purchaser are adequately marked.

It is the opinion of this office that the placement of a country of origin sticker on one panel of a box when there are other stickers bearing a U.S. address on different panels is in violation of § 134.46, Customs Regulations (19 CFR 134.46). The requirement that the country of origin information be in close proximity to a U.S. address has been interpreted to require that the origin marking appear on the same panel as the U.S. address so that the information is viewable in one inspection of one panel of the box. The origin information must be repeated in close proximity to every reference to any place not the country of origin, in this case it should therefore appear on both panels bearing the U.S. address.

As to the placement of the country of origin stickers on the outside of shrink-wrapping when the U.S. address labels are affixed directly to the box, there is no intrinsic violation in this scenario. If Customs inspectors are satisfied the box will reach the ultimate purchaser with the shrink-wrapping intact and the origin labels still affixed in the locations described above, marking requirements have been met. Conversely, if reason exists to suspect the shrink-wrapping, hence the origin labels, will be removed or otherwise not survive storage and handling en route to the ultimate purchaser, it shall be required to affix the origin labels directly to the box in the locations described above.

Holding:

Customs is of the opinion that hospitals are the ultimate purchasers of patient identification bracelets. We liken such bracelets to other disposable items provided for use by hospital personnel. It is the hospital personnel who are the last persons to receive the bracelets in the form in which they are imported and it is they who put the bracelet to its intended use.

A box containing imported patient identification bracelets that bears two labels with U.S. addresses affixed to two separate panels

and has a single country of origin label affixed to a third and different side is not in compliance with 19 U.S.C. 1304. The country of origin label must appear in close proximity to each reference to a U.S. address and be in comparable size lettering. The country of origin labels may be affixed after shrink-wrapping if Customs officers are convinced that the shrink-wrapping will remain intact until the boxes reach the ultimate purchasers. If there is reason to believe the shrink-wrapping will be removed or otherwise not survive storage and handling, then the country of origin labels must be affixed directly to the boxes as are the labels bearing the U.S. addresses.

(C.S.D. 88–27)

Marking: Country of origin marking of handbags.

Date: September 6, 1988
File: Mar–2–05 CO:R:C:V
731032 LW
Category: Marking

MR. HERBERT J. LYNCH
SULLIVAN & LYNCH, P.C.
156 State Street
Boston, Massachusetts 02109

Re: Country of origin marking requirements for handbags.

DEAR MR. LYNCH:

This is in response to your letter of February 2, 1988, on behalf of Bradlees Department stores (the importer), requesting a ruling on country of origin marking requirements for handbags.

Facts:

The importer proposes to import a new line of handbags under the registered trademark "Beacon Hill." You have enclosed a copy of the Certificate of Registration 1986, issued by the United States Patent and Trademark Office, as well as a sample hangtag with the phrase "Beacon Hill handbags" printed on both sides. The hangtag will be attached to the shoulder straps of the handbags. It is not clear whether the trademark "Beacon Hill" will appear on the handbag itself. However, you state that the country of origin will be printed on a textile label sewn into the inside lining directly under the zipper for the inside compartment.

Issue:

Whether marking the country of origin on a textile label sewn into the inside lining of the handbag directly under the zipper for the

inside compartment, complies with country of origin marking requirements?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C.1304), requires that, unless excepted, every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit in such a manner as to indicate to the ultimate purchaser the English name of the country of origin of the article.

Section 134.47, Customs Regulations (19 CFR 134.47), requires that when, as part of a trademark or trade name or as part of a souvenir marking, the name of a location in the United States or "United States" or "America" appear, the article shall be legibly, conspicuously, and permanently marked to indicate the name of the country of origin of the article preceded by "Made in," "Product of," or other similar words, in close proximity or in some other conspicuous location.

In reference to this regulation, you raise the question of whether "Beacon Hill" represents the name of a location in the U.S. In support of your position that "Beacon Hill" is not a location, as contemplated within the meaning of 19 CFR 134.47, you explain that it is not a city, town, county, or district, but rather a neighborhood. You point out that the reasonable consumer would not be mislead into believing that the handbags were manufactured in "Beacon Hill" because few individuals outside the Boston area would be familiar with the term "Beacon Hill," and those who are familiar with it would know that it is a residential neighborhood, and not a manufacturing section. Further, the importer has retail stores throughout the Eastern U.S., and thus the handbags will be sold other than in the immediate Boston Area.

The fact that "Beacon Hill" refers to an area in the U.S. rather than a city, town, county, or a district, does not mean that it is not a location in the U.S. as contemplated by 19 CFR 134.47. The purpose of 19 CFR 134.47 is to avoid misleading the ultimate purchaser as to the country of origin of the article. Regardless of whether it is possible to manufacture the handbags in "Beacon Hill," it is our position that this reference to a locality in the U.S. may mislead the ultimate purchaser to believe that the handbags were manufactured in the U.S.

Turning to the substantive issue, while 19 CFR 134.47 does not require that the country of origin marking be in close proximity to the misleading trademark, this section does require that the country of origin at least be in a conspicuous location. In addition, section 134.41(b), Customs Regulations (19 CFR 134.41(b)), requires that the ultimate purchaser must be able to find the country of origin marking easily.

Holding:

Regardless of whether the trademark appears on the handbag itself, because the hangtag printed with the trademark "Beacon Hill" attracts the attention of and may mislead the ultimate purchaser concerning the country of origin of the handbag, we do not believe that a textile sewn into the inner lining of the handbag under the zipper for the inside compartment is in a conspicuous location. It is our opinion that for the article to be conspicuously marked, the hangtag printed with the term "Beacon Hill," or another prominently displayed hangtag, should be marked with the country of origin of the handbag in addition to the sewn in label.

(C.S.D. 88–28)

Marking: Country of origin marking of vinyl cases to be filled in the U.S. with packets of pills.

Date: August 12, 1988
File: Mar 2–05 CO:R:C:V
731318 LR
Category: Marking

HOWARD BIEBER
NSC CORPORATION
4300 W. Lake Street
Chicago, Illinois 60624

Re: Country of origin marking requirements for vinyl cases to be filled in the U.S. with packets of pills.

DEAR MR. BIEBER:

This is in response to your letter dated March 7, 1988, requesting a ruling concerning the country of origin marking requirements of vinyl cases which will be filled in the U.S. after importation with packets of birth control pills.

Facts:

Heatsealed vinyl cases are imported in bulk (approximately 100 pieces in a polybag) and are sold to a pharmaceutical company. The cases are quite thin and flimsy in nature and measure approximately 4½ inches x 3¾ inches. There is a perforation in the middle of each case to permit it to be folded in half with a pocket on one side. The pharmaceutical company will insert a packet of birth control pills into the pocket of each vinyl case. The cases containing the birth control packets will then be distributed to the consumer by resale channels and free distribution.

Issue:

Whether it is acceptable to mark the country of origin on the polybag in which the vinyl cases are imported instead of the individual cases.

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the U.S. the English name of the country of origin of the article. Section 134.1(d), Customs Regulations (19 CFR 134.1(d)), defines "ultimate purchaser" as "generally the last person in the U.S. who will receive the article in the form in which it was imported."

The marking requirements which are applicable to containers depend in part on whether the containers are reusable or whether they are disposable. Section 134.23, Customs Regulations (19 CFR 134.23), provides that reusable containers, *i.e.,* containers or holders designed for or capable of reuse after the contents have been consumed, must be individually marked to indicate the country of their own origin, whether imported empty or full. The examples of reusable containers which are cited include mustard jars reusable as beer mugs; shaving soap containers reusable as shaving mugs; fancy cologne bottles reusable as flower vases, and other containers which have a lasting or decorative effect. Section 134.24, Customs Regulations (19 CFR 134.24), sets forth the requirements for disposable containers, *i.e.,* the usual ordinary types of containers or holders, including cans, bottles, paper or polyethelyne bags, paperboard boxes, and similar containers or holders which are ordinarily discarded after the contents have been consumed. If such containers are imported empty and are packed and sold in multiple units, 19 CFR 134.24(b) provides that the marking requirements ordinarily may be met by marking the outermost container which reaches the ultimate purchaser.

We consider the vinyl cases to be disposable containers within the meaning of 19 CFR 134.24 since they are an ordinary type of packaging which in most cases would be discarded after the pills have been consumed. Unlike the reusable containers mentioned in 19 CFR 134.23, the vinyl containers are flimsy and have no lasting value or decorative use. As such, it is acceptable to mark the outermost package which reaches the ultimate purchaser. Based on the facts presented, we believe that the ultimate purchaser of the vinyl case is the pharmaceutical company that places the packet or birth control pills within the case.

Holding:

The marking of the country of origin on the polybag in which the vinyl cases are imported, in lieu of marking the vinyl case itself, is acceptable provided the district director is satisfied that: 1) the cases are packed and sold in multiple units; 2) the cases will be used only in the manner described above and will not be otherwise sold; and 3) the importer will sell or otherwise supply the cases directly to the pharmaceutical company in their original unopened marked polybags. A statement to this effect should be submitted with each entry.

(C.S.D. 88–29)

Marking: Country of origin marking, MANUFACTURED FOR GIRLING IN TAIWAN is acceptable for marking purposes.

Date: August 12, 1988
File: MAR–2 05 CO:R:C:V
731324 LR

MS. SHARI DEAN
LUCAS SERVICE
LUCAS INDUSTRIES INC.
5500 New King Street
P.O. Box 7002
Troy, Michigan 48007–7002

DEAR MS. DEAN:

This is in response to your letter dated March 10, 1988, which asks whether the statement, "MANUFACTURED FOR GIRLING IN TAIWAN", is acceptable country of origin marking.

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to *indicate* to an ultimate purchaser in the U.S. the English name of the country of origin of the article (emphasis added).

In *American Burtonizing Co.* v. *United States,* 13 CCA 652, T.D. 41489 (1926), the U.S. Court of Customs Appeals interpreted the word "indicate" in the context of section 304(a) of the Tariff Act of 1922, the predecessor of section 304 of the Tariff Act of 1930. The court stated that:

> It is not reasonable to support that Congress, by the use of the word "indicate," meant only that the words used should *hint* at the country of origin. The object sought to be obtained by the

legislature could best be obtained by an indication which was clear, plain, and unambiguous and which did more than merely *hint* at the country of origin. We do not think that Congress intended that American purchasers, consumers, or users of foreign-made goods should be required to speculate, investigate, or interpret in order that they might ascertain the country of origin."

In HQ 728362, dated June 14, 1985, Customs determined that the following marking is acceptable since it clearly indicates the country of origin:

"MADE FOR APS
IN MEXICO
IN THE BORDER ZONE"

In HQ 730647, dated August 21, 1987, affirmed in HQ 730695, dated September 16, 1987, the phrase, "MADE IN TAIWAN NATIONAL HEADQUARTERS IN U.S.A.", was found to be unacceptable marking because it is subject to various interpretations, including one that implies that the goods were made in the U.S.

Based on the above precedents, we find that the marking, "MANUFACTURED FOR GIRLING IN TAIWAN", is not subject to various interpretations but, to the contrary, clearly indicates the country of origin. Accordingly, the statement is acceptable marking for purposes of 19 U.S.C. 1304.

(C.S.D. 88–30)

Copyright: Suspicion of infringement of copyrights of the California Raisin Advisory Board.

Date: August 12, 1988
File: CPR–3 CO:R:C:V
731620 SO
Category: Copyright

AREA DIRECTOR OF CUSTOMS
JFK AIRPORT AREA
JFK Airport, Building 178
Jamaica, New York 11430

Re: Copyright Infringement Question — "Grapevine Characters," (Drawings) — Hq. Issuance No. 88–010, Effective January 23, 1988 — California Raisin Advisory Board (CRAB) Registration No. VAu 108–410, unpublished — "CALRAB Late Show II" and "CALRAB Lunch Box," (Audiovisual) — Hq. Issuance No. 88–011, Effective January 26,1988 — CRAB Registration Nos. PA 317–912 and PA 317–909, published November 11, 1986.

DEAR SIR:

Your memorandum of July 18, 1988, requested a Headquarters decision pursuant to section 133.43(c)(1), Customs Regulations (19 CFR 133.43(c)(1)), concerning whether or not a sample soft sculpture called "Tuity Fruity" is an infringing importation pursuant to Section 602 of the Copyright Law (17 U.S.C. 602).

Facts:

The U.S. Customs Service JFK Airport Area Office detained a shipment of "Tuity Fruity" soft plush dolls consigned to Smile International, Inc. (Smile), on suspicion of piratical copying pursuant to Section 133.43 of the Customs Regulations (19 CFR 133.43). The importer denied copying and submitted a legal brief and a copy of a decision in the case of *Cory Van Rijn, Inc.*, v. *CRAB*, No. CV–F–87–038, U.S. District Court, Eastern District of California (March 30, 1987), in which CRAB, as a defendant in a copyright infringement action, successfully used the argument advanced by Smile in denying infringement in this case, to obtain a dismissal of the action. The copyright owner posted the required bond and submitted a copy of the decision in the case of *CRAB AND APPLAUSE, Inc.* v. *C.J.'s Beachwear, Inc.*, Civil No. 88–2305 (CSF), U.S. District Court, District of New Jersey (June 17, 1988) in which CRAB, as plaintiff in an infringement action, secured a preliminary injunction enjoining all defendants from marketing and distributing unauthorized and counterfeited merchandise depicting the copyrighted "The California Raisins." The entire file was sent to Customs Headquarters for a decision on the infringement question along with samples of two "Tuity Fruity" dolls and a genuine "The California Raisins" doll.

Issue:

Would the importation of "Tuity Fruity" dolls, made in Korea, infringe the above referenced copyright registrations of CRAB, which have been recorded with Customs for import protection?

Law and Analysis:

The basic test for determining whether there has been an infringement of a copyright is whether substantial similarity exists between two works. The appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work, *Ideal Toy Corp.* v. *Fab-Lu Ltd.*, 360 F.2d 1022 (1966). Another statement of the test is whether an ordinary observer who is not attempting to discover disparities between two articles would be disposed to overlook them and regard their aesthetic appeal as the same, *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487 (1960). The substantial similarity test was developed in order to bar a potential infringer from producing a supposedly new and different work by deliberately making trivial or insignificant variations in specific features of the copyrighted work.

Section 602(b) of the Copyright Law (17 U.S.C. 602(b)) provides that, "In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited." Section 603(c) of the Copyright Law (17 U.S.C. 603(c)) provides that, "Articles imported in violation of the importation prohibitions of this title are subject to seizure and forfeiture in the same manner as property imported in violation of the Customs revenue laws. Forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be; however, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer has no reasonable grounds for believing that his or her acts constituted a violation of law."

Two steps are involved in the test for infringement. There must be access to the copyrighted work and substantial similarity not only of the general ideas but the expression of those ideas as well. CRAB obtained its copyright registrations for "CALRAB Late Show II" and "CALRAB Lunch Box" on November 11, 1986. If it is apparant that a party suspected of infringement had an opportunity to view the copyrighted work, access may be established even without direct evidence if the substantial similarities are so striking as to preclude the possibility that the works were arrived at independently. We note that Smile obtained a copyright registration for their "Tuity Fruity" soft sculpture effective February 16, 1988. Customs may detain articles covered by copyright registrations on suspicion of infringing other works covered by copyright registrations with earlier dates of first publication (C.S.D. 86–23). However, in this case, for the reasons set forth below, we are of the opinion that further detention is not warranted.

CRAB is responsible for the promotion of raisins from the State of California. CRAB's most successful advertising campaign features the animated figures of raisins singing and dancing to the song, "I Heard It Through The Grapevine." Applause, Inc. (Applause), has been licensed by CRAB to market assorted merchandise utilizing "The California Raisins" trademark and copyrighted images. The "California Raisin" product line has been extensively advertised and promoted by Applause since 1987. The sample "The California Raisins" doll features thin bendable arms and legs, with large exaggerated hands and feet which allow the doll to assume different standing positions. Two button spats appear to cover the pillow like feet. The doll is made of deep purple velour. The body consists entirely of a wrinkled cartoon like raisin face. The arms extend from the sides of the face at cheek level and the legs from the extreme lower left and right sides of the face. The eyes lack lids, giving the face a wide eyed alert look. The doll is holding a microphone in its left hand, which plays, "I Heard It Through The Grapevine." A

short white shirt with two buttons, a collar and blue bow tie is attached below the lips.

The Smile import known as "Tuity Fruity" is also a plush doll which is shaped like some unspecified fruit. The face is cartoon like, with limp arms extending from the sides of the face below the ears and the legs extending from below the chin. The hands and feet are smaller and less exaggerated than those on "The California Raisins" doll, and the doll cannot stand alone. There is no microphone and the feet lack spats. The nose resembles an elephant trunk with a pom pom on the end. The eyes have drooping lids, which gives the face a sleepy eyed look. The lips are thinner and the mouth opens revealing white teeth. A small shirt front and blue bow tie are attached below the chin.

The *Cory Van Rijn* case submitted by the attorneys for Smile is most interesting as it emphasizes principles of copyright law used by CRAB itself in defending an infringement lawsuit. The defendant (CRAB) contended that a humanized raisin figure is nothing more than a common idea, incapable of copyright protection. It is an axiom of copyright law (17 U.S.C. 102(b)) that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself, *Sid & Mary Krofft Television* v. *McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir 1977). CRAB asserted that the plaintiffs, as a matter of law, cannot claim copyright protection in the idea of a humanized raisin, any more than one artist can claim copyright protection in the idea of "statutes of nudes." The 9th Circuit explained in the *Krofft* case that, "The idea and the expression will coincide when the expression provides nothing new or additional over the idea. Thus the expression of a jeweled bee pin contains nothing new over the idea of a jeweled bee pin. When idea and expression coincide, there will be protection against nothing other than identical copying of the work."

Furthermore, the 9th Circuit commented in the case of *Cooling Systems and Flexibles* v. *Stuart Radiator*, 777 F.2d 485 (9th Cir. 1985), that, *"Landsberg's* principle — that the fewer the methods of expressing an idea, the more the allegedly infringing work must resemble the copyrighted work in order to establish substantial similarity — must govern. Here the range of possible expressions is extremely narrow; it embraces only variations on a catalog arrangement." The District Court found, with regard to the competing articles in the *Cory Van Rijn* case, that, "When there are only a limited number of ways to create the image of humanized raisins, the copying must be identical or virtually so to state a claim for copyright infringement. Here, the two works do not in any way look alike beyond the raisin bodies, and the images projected are completely different."

Based on our examination of the samples submitted and upon consideration of the principles of copyright law which apply in this case, we are of the opinion that substantial similarity is lacking.

Differences noted in the appearance of the "Tuity Fruity" soft sculpture as opposed to "The California Raisins" include the nose, lips, hands and feet; the presence of ears, visible eyelids and teeth; the lack of spats, a microphone that plays a musical work, and rigidity in the arms and legs; as well as the overall shape and expression on the face. The only area of similarity noted was the use of a white shirt front with collar and a blue bow tie attached below the lips. In our opinion, the "Tuity Fruity" doll was not copied from "The California Raisins." We are of the opinion that Smile did not infringe the copyrights of CRAB by using the idea of a humanized fruit in creating their "Tuity Fruity" soft sculpture and obtaining a copyright registration for that work.

Holding:

We are of the opinion that the imported "Tuity Fruity" doll does not infringe the copyright registrations of CRAB for "Grapevine Characters," "CALRAB Late Show II" and "CALRAB Lunch Box." Accordingly, an unlimited number may enter the U.S. as non-infringing of the rights of any other copyright owner. The Customs Service has received an application from Smile, International, Inc., to record their copyright registration for "Tuity Fruity," and we will proceed with the recordation promptly. All articles now under detention may be released to the importer along with the bond of the California Raisin Advisory Board. Copies of this decision may be furnished to all interested parties.

U.S. Customs Service

General Notice

19 CFR Part 133

APPLICATION FOR RECORDATION OF TRADE NAME: "DUART INDUSTRIES, LTD."

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "DUART INDUSTRIES, LTD", used by Duart Industries, Ltd., a corporation organized under the laws of the State of California, located at 984 Folsom Street, San Francisco, California 94107.

The application states that the trade name is used in connection with wholesale and retail hair conditioners and shampoos. The products are manufactured in California.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before December 12, 1988.

ADDRESS: Written comments should be addressed to U.S. Customs Service, Attention: Value, Special Programs and Admissibility Branch, 1301 Constitution Avenue, NW. (Room 2104), Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Velma Taylor, Value, Special Programs and Admissibility Branch, 1301 Constitution Avenue, NW. Washington, DC 20229 (202–566–5765).

Dated: October 6, 1988.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs & Admissibility Branch.

[Published in the Federal Register, October 13, 1988 (53 FR 40163)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

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Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 88–123)

ROBERT J. FUSCO, PLAINTIFF *v.* U.S. TREASURY DEPARTMENT, DEFENDANT

Court No. 87–11–01081

[Defendant's motion for judgment upon the agency record is granted; action is dismissed.]

(Decided September 14, 1988)

Galvin, Haroian & Mlawski (*Richard Haroian*) for plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Civil Division, Commercial Litigation Branch, U.S. Department of Justice (*Michael T. Ambrosino*) for defendant.

OPINION

TSOUCALAS, *Judge:* Plaintiff filed this action to contest the decision of the Secretary of the Treasury ("Secretary") revoking his customhouse broker's license (No. 5502) pursuant to 19 U.S.C. § 1641 (1982), *amended by* 19 U.S.C. § 1641 (Supp. II 1984). This Court has jurisdiction under 28 U.S.C. § 1581(g)(2). Defendant has moved for judgment upon the agency record in accordance with USCIT R. 56.1(a).

BACKGROUND

On August 16, 1984, the Regional Commissioner of Customs served upon plaintiff a "Notice of Preliminary Proceedings" and a "Proposed Notice to Show Cause and Statement of Charges." This Notice indicated that the United States Customs Service ("Customs") was considering instituting formal proceedings against plaintiff for the purpose of revoking his license to practice as a customhouse broker. Administrative Record Exhibit 1.[1]

The preliminary proceedings afforded plaintiff the opportunity to show cause why his license should not be revoked and to avoid the institution of formal proceedings. The issue not being resolved in the preliminary stage, Customs instituted formal proceedings on

[1] Hereinafter all references to exhibits in the Administrative Record shall be designated "A.R. Ex. ——."

December 2, 1985, by serving upon plaintiff a "Notice to Show Cause and Statement of Charges,"[2] which read as follows:

> CHARGE I: Violation of Section 111.29(a) of the Customs Regulations (19 C.F.R. 111.29[)] which provides in pertinent part that "[f]unds received by broker from a client for payment of duty* * *owing to the Government shall be paid to the Government within 30 days from date of receipt or date due, whichever is later."
>
> SPECIFICATION: For Entry No. 524901, you received the sum of $101,125.94 for duties from Jeri-Jo Knitwear on October 26, 1982, but never turned over such funds to Customs. Therefore, you did not turn over the funds to Customs within 30 days following the date you received from the importer.
>
> CHARGE II: Violation of Section 111.36 of the Customs Regulations (19 C.F.R. 111.36(a)[)] which prohibits a broker from entering into any agreement with an unlicensed person to transact Customs business for others "in such manner that the fees or other benefits resulting from the services rendered for others inure to the benefits of the unlicensed person."
>
> SPECIFICATION: On April 30, 1982 and May 5, 1982 Armen Cargo Services, Inc., an unlicensed person, "(Armen)" used entry numbers assigned to you for Entry Nos. 82–753500 and 82–753505. Customs duty and other charges for both entries were billed to the importer, Argenta USA, Inc. by Armen Cargo Services, Inc. A corporate Power of Attorney (Customs [Form 5291) dated September 8, 1981 which was executed by] Argenta USA, Inc. named "R.J. Fusco/Armen Cargo Services/Jack Nourijanian as agents for Customs transactions. On Entry No. 82–753500 the entry summary was presented to Customs on May 17, 1982 without payment together with a letter on Armen's stationary [sic] indicating the entry was being surrendered without payment because the importer "refused or is unable to pay." You paid the duty to Customs on August 24, 1982 and billed Armen for the duty on this entry.
>
> On Entry No. 82–753505, Armen paid the duty directly on September 23, 1982 and on May 21, 1982 [sic] presented the entry summary to Customs on your Consumption Entry Form CF 7501.
>
> CHARGE III: Violation of Section 111.37 of the Customs Regulations (19 C.F.R. 111.37) which prohibits a broker from permitting his license or his name to be used by or for any unlicensed person, other than his own employees.
>
> SPECIFICATION: The same as set forth under Specification of Charge III.[3]
>
> The charges and specifications set forth herein, jointly and separatly [sic], constitute grounds for the revocation of your license to engage in the business of a Customhouse broker.

[2] These charges were essentially identical to the charges listed in the Proposed Notice forwarded on August 16, 1984.
[3] The Court believes that this specification intended to refer to Charge II.

> Sections 554 and 558, Title 5 United States Code, (5 U.S.C. 554, 558) are applicable to the formal proceedings. You will be notified within ten (10) days after service of this notice of the time and place of a hearing on the charge. You have the right to be represented by counsel and you will have the right to cross-examine the witnesses at such hearing. Prior to a hearing on the charges, you may file in duplicate your verified answers to the charges with the Regional Commissioner of Customs, New York, New York.

A.R. Ex. 2.

The hearing concerning plaintiff's license revocation was held on January 30, 1986 before Anthony L. Piazza, the hearing officer designated by Customs pursuant to 19 U.S.C. § 1641(b), *amended by* 19 U.S.C. § 1641(d)(2)(B). A.R. Ex. 4. After the hearing, Mr. Piazza recommended revocation of the plaintiff's customhouse broker's license and the Assistant Secretary of the Treasury agreed, thereby revoking plaintiff's license on July 15, 1987. *See* A.R. Ex. 13 at 7; A.R. Ex. 27.

Plaintiff now claims that the hearing before Mr. Piazza was a nullity because it was conducted under section 641 of the Tariff Act of 1930, 19 U.S.C. § 1641(b) (1982), prior to the amendments made by section 212(a) of the Trade and Tariff Act of 1984, 19 U.S.C. § 1641(d) (Supp. II 1984) (hereinafter the "1984 Act"). Insisting that the revocation proceedings were not "instituted" until after the effective date of the 1984 Act, October 30,1984, plaintiff maintains that the amended version of section 641 should apply to the instant action.[4] action. Plaintiff argues that revocation proceedings are not "instituted" until the commencement of formal proceedings upon receipt of the "Notice to Show Cause and Statement of Charges." Defendant, on the other hand, asserts that revocation proceedings are instituted upon the commencement of the preliminary proceedings, when the "Proposed Notice to Show Cause and Notice of Preliminary Proceedings" are received.

The significant difference between the pre-amended and the amended statutes is that the amended version of section 641 provides for the revocation hearing to be held before an Administrative Law Judge appointed pursuant to 5 U.S.C. § 3105, whereas the pre-amended section 641 only required an "appropriate customs officer" to conduct the hearing. The plaintiff, therefore, concludes that the Secretary lacked the requisite power to enforce the hearing officer's decision in the absence of the administrative hearing required by statute.

The issue in the instant action is whether the revocation proceedings against plaintiff are deemed "instituted" from the date prelimi-

[4] The 1984 Act specifies that a revocation proceeding is to be "governed by the law in effect at the time the proceeding was *instituted*." Section 214(d)(3) of the Trade and Tariff Act of 1984 (codified at note to 19 U.S.C. § 1304 (Supp. II 1984)) (emphasis added).

nary proceedings are commenced or from the date formal proceedings are initiated.

Plaintiff also alleges a violation of his due process rights because his request for review of the agency record prior to the hearing was denied by the hearing officer.

DISCUSSION

Section 214(d)(3) of the Trade and Tariff Act of 1984 provides that:

> *[a]ny proceeding* for revocation or suspension of a license instituted under section 641 of the Tariff Act of 1930 before the date of the enactment of this Act shall continue and be governed by the law in effect *at the time the proceeding was instituted.*

Pub. L. 98–573, 98 Stat. 2948, 2989 (codified at note to 19 U.S.C. § 1304) (emphasis added). The preliminary proceedings initiated against plaintiff according to 19 C.F.R. § 111.59[5] fit squarely within section 214 of the 1984 Act. Section 214 encompasses "*any* proceeding for revocation or suspension of a license"; it does not differentiate between preliminary and formal proceedings. *See* 19 C.F.R. §§ 111.59–.62. If Congress had intended the 1984 amendments to apply only upon the institution of formal proceedings, it would not have used the expansive "any proceedings" terminology. Furthermore, under the regulations a broker *must* be afforded the opportunity to participate in preliminary proceedings to possibly avoid formal proceedings against his license. 19 C.F.R. § 111.59.

Plaintiff asserts the proceedings are not "instituted" until commencement of formal proceedings, when the "Notice to Show Cause" is issued. Plaintiff reasons that the Notice to Show Cause initiates the procedures required to be followed in connection with the hearing, whereas the "Notice of Preliminary Proceedings" accompanied by the "Proposed Notice to Show Cause" triggers no such action. The Court is not persuaded by plaintiff's argument. "Preliminary Proceedings" are, in fact, proceedings within the ambit of section 214 of the 1984 Act; they are commended under the customs regulation entitled "Preliminary *proceedings*." *Id.* (emphasis added). The applicable law, therefore, is the law in effect at the time the preliminary proceedings are instituted. The Court now turns to the question of whether the revocation decision was supported by the evidence in the record.

[5] § 111.59 Preliminary proceedings.

(a) *Opportunity to participate.* Unless the Commissioner, under § 111.57, has determined that the preliminary proceedings shall not be followed, the district director shall advise the broker of his opportunity to participate in preliminary proceedings with an opportunity to avoid formal proceedings against his license.
(b)*Notice of preliminary proceedings.* The district director shall serve upon the broker, as set forth in § 111.63, a notice in writing that:
(1) Transmits a copy of the proposed statement of charges;
(2) Informs him that 5 U.S.C. 554 and 558 will be applicable if formal proceedings are necessary;
(3) Invites him to show cause, if he so desires, why the formal proceedings should not be instituted;
(4) Informs him that he may make submissions and demonstrations of the character contemplated by the cited statutory provisions;
(5) Invites any negotiation for settlement of the complaint or charge that the broker deems it desirable to enter into;
(6) Advises him of his right to be represented by counsel; and
(7) Specifies the place where and a reasonable time within which the broker may respond in writing and/or orally.

STANDARD OF REVIEW

The applicable standard for reviewing the Secretary's decision to revoke plaintiff's broker's license is whether the determination is supported by substantial evidence. 19 U.S.C. § 1641(b). Substantial evidence means more than a mere scintilla "[i]t means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *NLRB,* 305 U.S.197, 229 (1938). In the case at bar, the Court concludes that there is substantial evidence in the record to support the Secretary's revocation decision.

Plaintiff was charged with violating three different sections of the Customs regulations.[6] The conduct which led to violation of 19 C.F.R. § 111.29(a)[7] was plaintiff's failure to pay Customs $101,125.94 for Customs duties received from Jeri-Jo Knitwear ("Jeri-Jo"), an importer. Plaintiff admitted receiving checks totalling approximately $356,000.00 from Jeri-Jo to cover charges for several of Jeri-Jo's importations. A.R. Ex. 4 at 64–65. Plaintiff later conceded using a portion of these funds for his own operating expenses and for duty advances on behalf of other clients. A.R. Ex. 4 at 75. Consequently, plaintiff never paid Customs the money forwarded to him by Jeri-Jo for the payment of duties, forcing Jeri-Jo to tender $101,125.94 to Customs as well as an additional $4,600.66 in liquidated damages.[8]

Plaintiff's only defense to this charge is his claim that brokers are compelled to advance their own funds for payment of Customs duties on behalf of their clients because duties must be submitted to Customs within ten working days of entry. Plaintiff further contends that the "10-day rule" is unworkable without making such advances. However, defendant introduced testimony at the hearing by another customhouse broker that contradicted both of plaintiff's assertions. A.R. Ex. 4 at 44–47. The broker stated that it is not realistic to advance funds on behalf of an importer, and that he experienced little difficulty operating within the 10-day rule. A.R. Ex. 4 at 43–46. The Court, therefore, finds plaintiff's defenses to be without merit and not an excuse for failing to comply with Customs regulations.

The conduct which led to the violation of 19 C.F.R §§ 111.36(a)[9] and 111.37[10] of the Customs regulations was undisputed. *See* A.R.

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[6] 19 C.F.R. §§ 111.29(a), 111.36(a), and 111.37.

[7] § 111.29 Diligence in correspondence and paying monies.

(a) *Due diligence by broker.* Each broker shall exercise due diligence in making financial settlements, in answering correspondence, and in preparing or assisting in the preparation and filing of documents relating to any matter handled by him as a broker. Funds received by a broker from a client for payment of duty, tax, or other debt or obligation owing to the Government shall be paid to the Government within 30 days from date of receipt or date due, whichever is later.

[8] Jeri-Jo thereafter commenced an action in the Supreme Court, State of New York, County of New York, against plaintiff for damages and was granted a judgment in the amount of $118,581.65 for damages and costs, only $13,000.00 of which had been recovered by Jeri-Jo. *See* A.R. Exs. 5, 13.

[9] § 111.36 Relations with unlicensed persons.

(a) *Service to others not to benefit unlicensed person.* A broker shall not enter into any agreement with an unlicensed person to transact Customs business for others in such manner that the fees or other benefits resulting from the services rendered for others inure to the benefit of the unlicensed person except as provided in paragraph (b) [freight forwarder exception] * * *.

[10] § 111.37 Misuse of license.

A broker shall not permit his license or his name to be used by or for any unlicensed person, other than his own employees authorized to act for him, or by or for any broker whose license is under suspension in the solicitation, promotion or performance of any Customs business or transaction.

Ex. 9. Plaintiff allowed Armen Cargo Services ("Armen"), an unlicensed broker, to use entry numbers assigned to plaintiff regarding two entries. *Id.* Customs duty and other charges for both entries were billed to the importer of record, Argenta USA, ("Argenta"), by Armen.

At the hearing, plaintiff's defense to these charges was that Armen functioned as a freight forwarder, and therefore fell within the exception provided in 19 C.F.R. § 111.36(b). In accordance with 19 C.F.R. § 111.36(b), plaintiff asserts that Armen can receive fees and benefits resulting from services rendered. A.R. Ex. 12 at 7. This exception is valid, however, only if certain conditions are met. One of the conditions requires a broker to transmit directly to the importer a copy of his brokerage charges if they are to be collected by or through a freight forwarder. 19 C.F.R. § 111.36(b)(2). Argenta, however, received notice of the charges on Armen stationery and received a bill directly from Armen, the unlicensed entity. Additionally, the freight forwarder exception merely allows compensation for services; it does not condone the actual practice of Customs business by an unlicensed person. *See* 19 C.F.R. § 111.36(b). Therefore, based on the evidence in the record, the Court concludes the Secretary had sufficient justification to revoke plaintiff's license pursuant to 19 C.F.R. § 111.53.[11]

"An agency's choice of sanction is not to be overturned unless the reviewing court determines it is unwarranted in law * * * or without justification in fact." *Kulkin* v. *Bergland,* 626 F.2d 181, 184 (1st Cir. 1980) (quoting *Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182, 185–86 (1973)). Based on a thorough review of the record, this Court is of the opinion that there is a basis in fact for the Secretary's decision revoking plaintiff's customhouse broker's license.

Due Process

Plaintiff additionally claims he did not "have an opportunity to prepare to refute the evidence that was in the administrative file prior to the hearing * * * [and] had no knowledge as to the evidence contained therein which may have had a bearing on the factual findings of this case." *Plaintiff's Response to Defendant's Motion for Judgment Upon the Agency Record* at 24. The Court, however, finds that there was no deprivation of due process.

As annunciated in *Barnhart* v. *United States Treasury Department,* 7 CIT 295, 303, 588 F. Supp. 1432, 1438 (1984), "due process of law" requires notice and the opportunity to be heard. Additionally, the touchstone is one of fundamental fairness in light of the total circumstances. *Id.* (citing *Buttny* v. *Smiley,* 281 F. Supp 280 (D.

[11] The Secretary's action revoking the plaintiff's customhouse broker's license was taken pursuant to 19 C.F.R. § 111.53, which provides that:

> Failure or refusal to comply with the duties, responsibilities, or requirements specified in Subpart C or elsewhere in this part relating to brokers may be deemed grounds for suspension or revocation of the license of a broker. Such duties, responsibilities, or requirements are not to be considered as exclusive. Conduct not within the purview of any specification of this part may be deemed to be conduct warranting the suspension or revocation of a license under the authority of section 641(b), Tariff Act of 1930, as amended (19 U.S.C. 1641(b)).

Colo. 1968)). In the present case, plaintiff presented no proof that he was in any way prejudiced by denial of access to the administrative record prior to the hearing. He had sufficient notice and counsel competently presented plaintiff's case before the hearing officer. Plaintiff was also aware of the charges beforehand and the reasons Customs instituted proceedings against his customhouse broker's license. In light of these circumstances, the Court fails to find a denial of plaintiff's due process rights.

CONCLUSION

There being no procedural irregularities in the agency's action, no abuse of discretion, and substantial evidence on the record to support the Secretary of the Treasury's decision, defendant's motion for judgment upon the agency record is granted and judgment entered in favor of the defendant, dismissing this action.

(Slip Op. 88–124)

CPC INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 82–4–00526

Before RAO, *Judge.*

[Plaintiff's motion for summary judgment granted, defendant's cross-motion for summary judgment denied.]

Dehydrated soups sold in the home market in cartons of ten packages, each weighing one kilogram, formed the basis for export value of dehydrated soups imported into the United States in cartons of twelve packages weighing two pounds each. The proper basis of appraisement is the foreign value less 10.13 percent for the difference in the weight between the kilo and the two pound packages.

(Dated September 15, 1988)

Fitch, King & Caffentzis (*James Caffentzis* on the briefs) for the plaintiff.

John R. Bolton, Assistant Attorney General, Joseph I. Liebman, Attorney in Charge, International Trade Field Office (*Barbara M. Epstein* on the briefs) for the defendant.

RAO, *Judge:* This civil action is before the Court on plaintiff's motion for summary judgment and defendant's opposition thereto and cross-motion for summary judgment.

The imported merchandise consists of numerous varieties of Knorr soup mixes manufactured in and exported from Switzerland in institutional sized packages of two pounds. Knorr dehydrated soups are sold in Switzerland in institutional sized packages of one kilogram (2.2046 pounds).

On liquidation the merchandise was appraised on the basis of foreign value under section 402a(c), Tariff Act of 1930, as amended. The appraised unit values were the various home market prices for kilogram sized packages, less a 2 per cent quality discount, packed.

The parties have stipulated that foreign value is the proper basis for appraisement. Plaintiff claims that there is a 10.13 percent difference in the weight of the product sold in the home market and that of the imported merchandise, and that it is entitled to an allowance of 10.13 percent in the appraised values.

Defendant's position is that the merchandise is sold and was appraised on the basis of price per package, not on the basis of price per kilogram. Defendant also claims that the 10.13 percent differential between the domestic soup package and the 2 pound export package is not sufficiently significant to preclude a finding of similarity for tariff purposes.

Plaintiff and defendant have agreed that foreign value is represented by the values shown on price lists, one furnished by defendant and several furnished by plaintiff. Defendant's price list enumerates values in Swiss francs for 22 varieties of dehydrated soups, per carton, less 2 percent packed, for the years 1975 through 1978, the time during which the merchandise at issue was imported. The cartons contain twelve two pound packages for all varieties except "Toasted Flour" soup, which consists of twelve 35 ounce packages. Four varieties were listed without Swiss franc values, but with the notation "COP". This price list does not contain a per package price or value for the merchandise.

The price lists supplied by plaintiff for the time periods at issue, January 1977 through March 1978 contain prices or values in the home market at Swiss francs per package. The November 1978 price list, the last one to apply to the imported merchandise, lists per package values and give *per carton* values as well. The carton in the home market contains ten one-kilogram packages.

The Court does not find the price list submitted by defendant to be probative of defendant's position that foreign value is based on specified prices per package. The price list submitted by Custom's import specialist does not contain *pr package* prices, but prices *per carton*. This is not supportive of the government's claim that foreign value was based on a per package price. Neither do the price lists supplied by the Knorr Company support the Government's contention that the foreign value is a per package value: these price lists contain a "grund preis" or base price in Swiss francs per 1 kilogram, and list original carton contents as "ten X 1 kg." The Court cannot conclude from these price lists that the price in the home market was based on per package rather than per kilogram values.

The Court cannot agree that the 10.31% differential between the domestic soup package of 1 kilogram and the 2 pound export package is not significant enough to preclude a finding of similarity for tariff purposes. In *United States* v. *Oscar E. Eggen (American Express Co.), et al.* 55 CCPA 95, our appeals court found sufficient dissimilarity between metric size and inch size ball bearings to preclude a finding that the imported bearings were "similar" to those offered for sale to all purchasers for home consumption. In reaching

its decision, the Court considered whether the articles were commercially interchangeable, as well as factors of similarity of materials and cost. The Court found that the bearings were not commercially interchangeable and concluded that cost of production was the proper basis for appraisement.

The instant case differs in that some commercial adaptability exists between a package of soup weighing 2 pounds and one weighing 2.2 pounds. The ultimate user would only be required to increase the amount of liquid by approximately 10.31 percent for the kilo package to yield a product substantially similar to that produced by the 2 pound package. The *amount* of soup produced per package would vary, but not the quality. The commercial value would vary it that more than 10% more soup can be produced from the kilo package than from the 2 pound package.

In *United States* v. *The American Bluefriesveem, Inc. (Van Houten Co.),* 22 CCPA 67, 71, 72 (1934) the Court held that where there is substantial evidence that the merchandise is made of the same materials, made by the same process, is commercially interchangeable with, is adapted to the same materials, made by the same process, is commercially interchangeable with, is adapted to the same use as, and is used for the same purpose as the merchandise sold in the home market at the time of exportation, the requisite similarity exists. All of these factors exist in the instant case, except that there is a 10.31 percent difference in quantity, both in the imported merchandise and in the end product obtained from it.

In *United States* v. *Arkell Safety Bag Co.*, 24 CCPA 26 (1936), the Court considered the value for appraisement purposes of paper imported into the United States in rolls. Our appeals court held that the paper should be considered as paper *per se* and not as rolls of paper, where the rolls sold in the home market, due to the demands and necessities of consumers there, were much smaller in diameter and more costly to produce and place in packaged condition than the large rolls imported into this country. Applying this holding to the case at bar, it is the dehydrated soup mix that forms the basis of value for apprisement purposes. Since the soups in both countries are the same, except as to the quantity contained in the packages, the imported is entitled to the 10.31 percent difference in the weight.

Finally, we are persuaded by the decisions of this Court in *Pistorino & Co., Inc.* v. *United States,* 1 CIT 418, R81/6 (1981), 1 CIT 419, R81/7 (1981), 1 CIT 419, R81/8 (1981), 1 CIT 419, R81/9 (1981 and 1 CIT 420, R81/10 (1981) in which the Government agreed to statements of fact in which dehydrated soups were appraised at unit values, in Swiss francs, (as set forth in red ink on the invoices and/or entry papers), less 10.31 percent packed, which reflected the difference in quantities between kilos and pounds.

It is, therefore,

ORDERED that plaintiff's motion be, and the same hereby is, granted, and it is further

ORDERED that summary judgment be, and the same hereby is, entered in favor of plaintiff, and it is further

ORDERED that the appropriate customs officer reliquidate the entries in accordance with the decision herein and refund all excessive duties, together with the appropriate interest thereon, and it is further

ORDERED that defendant's cross motion for summary judgment is denied.

(Slip Op. 88–125)

USX CORPORATION, F/K/A, UNITED STATES STEEL CORP., PLAINTIFF *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND PROPULSORA SIDERURGICA, S.A.I.C., DEFENDANT-INTERVENOR

Court No. 85–03–00325

[Judgment for defendant.]

(Dated September 16, 1988)

USX Corporation (*John J. Mangan, J. Michael Jarboe, Craig D. Mallick* and *Robin K. Capozzi*), for plaintiff.

Lyn M. Schlitt, General Counsel, *James A. Toupin*, Assistant General Counsel and *Timothy M. Reif*, United States International Trade Commission, for defendant.

Mudge, Rose, Guthrie, Alexander & Ferdon (*David P. Houlihan, Jeffrey S. Neeley*) for defendant-intervenor.

OPINION AND ORDER

RESTANI, *Judge:* Plaintiff, USX Corporation, brings this action challenging the final determination of the United States International Trade Commission (ITC) that an industry in the United States was neither materially injured nor threatened with material injury by reason of imports of cold-rolled carbon steel plates and sheet from Argentina that were sold at less than fair value. *Cold-Rolled Carbon Steel Plates and Sheets from Argentina*, Inv. No. 731–TA–175 (May 1988) (Remand II).

Before the court are the results of the second remand in this action. In the court's previous opinion, *USX* v. *United States*, 12 CIT ——, Slip Op. 88–30 (March 15, 1988), the action was remanded to ITC because two of the four opinions comprising the majority were found to be legally flawed and not based on substantial evidence in their analysis of causation. The court also directed ITC to address further the issue of cumulation, specifically regarding imports from

Brazil and Korea.[1] [2]Each of these issues will be discussed separately.

Discussion

I. Cumulation

Prior to the Trade and Tariff Act of 1984, the cumulation of imports was discretionary and ITC could decide properly not to cumulate where the subject imports exhibited different trends in the U.S. market distinct from those of other countries imports or where other conditions of trade indicated that cumulation would be inappropriate. *USX* v. *United States*, 11 CIT ——, ——, 655 F. Supp. 487, 491–92; *Lone Star Steel Co. v. United States*, 10 CIT——, ——, 650 F. Supp. 183, 186–87 (1986).

In the present case, ITC has based its decision not to cumulate imports of Brazil and Korea with those of Argentina on differing trends in import volume, insufficient similarities in pricing patterns and limited geographic overlap in the markets served by the imports.[3] Plaintiff agrees that prior to 1984 such distinctions could justify a decision not to cumulate when properly employed, but argue that a finding of divergent trends among these imports is not supported by the record in this case and that ITC's failure to cumulate imports from Brazil and Korea with those of Argentina was arbitrary, capricious and an abuse of discretion.[4]

In its discussion of import volume trends, ITC notes that Argentine imports retained an essentially flat market share during the period of investigation while Brazilian and Korean imports increased their market share significantly during the same period.[5] Thus, Argentine imports were actually losing position relative to other importing countries during the period.[6] This observation is clearly substantiated in the record. *See* Remand I at A–7.

The record also supports ITC's finding that pricing patterns of Argentine imports show only limited similarity with those of Brazil and Korea. In the supplemental report to the first remand determination, ITC staff states that "[w]hile all of the price indexes are pos-

[1] The court held that Mexican, Spanish and South African imports need not be cumulated with Argentine imports.

[2] The court found no significant errors in ITC's negative determination regarding threat of material injury.

[3] In ITC's first remand determination, *Cold-Rolled Carbon Steel Plates and Sheets from Argentina*, USITC Pub. No. 1967, Inv. No. 731–TA–175 (March 1987) (Remand I), two members of the majority based their decisions not to cumulate Korean imports on such differing trends. One commissioner treated Brazilian imports in the same manner. In Remand II, all the commissioners who voted based their decision on Brazilian and Korean imports on such analysis. One commissioner declined to act on the remand order because he was not on the Commission at the time of the original decision. Although this had no effect on the outcome, remand is made to the entire Commission. The Commission, rather than individual commissioners, acts.

[4] Plaintiff makes much of ITC's statement in the supplemental staff report to Remand I that "[i]n general, imports of such cold-rolled sheets from all sources compete for the same customers, e.g., service centers, and have a simultaneous impact in the U.S. market." Remand I at A–8. While this general statement confirms the fungibility of Argentine cold-rolled sheet with that imported from other countries, it does not, standing alone, contradict ITC's findings regarding disparate trends. The data discussed in the text, on the other hand, supports the determination.

[5] After rising steadily from 1981–1983, Brazilian imports did decline slightly during the first three quarters of 1984. This reduction may have been linked to a suspension of liquidation of Brazilian imports which took effect in November 1983.

[6] In its opinion reviewing the original determination, the court did express concern that Argentina's import volume trends may have been affected by the initiation of the antidumping investigation and subsequent suspension of liquidation. That concern was significant because of ITC's inadequate discussion of the significance of import volume and failure to cite any trends or market conditions which would support its decision not to cumulate. *USX*, *11* CIT at ——, 655 F.Supp. at 492. These inadequacies have been rectified in the current determination. Furthermore, the initiation of this investigation and suspension of liquidation, both of which occurred in early 1984, are not likely to have affected Argentine import trends for the entire 1981–84 period.

itively correlated, the Argentine prices are less highly correlated with those of the other three countries [Brazil, Korea and South Africa] and not in a statistically significant manner than are the prices of those countries with each other." Remand I at A–10; *see id.* at A–11.

Finally, the record confirms ITC's conclusion that there is little geographic overlap between U.S. markets served by Argentina and Korea and that the geographic concentration of the imports of Argentina and Brazil differs significantly. *See* Remand I at A–8 and A–9.

In light of this evidence, the court finds that ITC acted within its discretion in not cumulating Argentine imports with those from Brazil and Korea.

II. Causation

In the determination presently before the court, the two commissioners whose causation analyses the court previously found insufficient concur with the two remaining members of the majority who utilize a traditional approach to causation analysis. That causation analysis, which was set forth in its entirety in Remand I, is now the subject of review.

Under a traditional approach to causation analysis, ITC closely follows the statutory outline and focuses its attention on the volume of imports of the subject merchandise, the effects of those imports on prices of United States like products, and the impact of those imports on domestic producers of like products. 19 U.S.C. § 1677(7)(B) (1982). In evaluating each of these factors, ITC considers various indicators which are set forth at 19 U.S.C. § 1677(7)(C) (1982).[7]

Initially it should be noted that Congress has vested ITC with considerable discretion as to the weight it will assign a given factor in making its injury determination. *Copperweld Corp.* v. *United States,* 12 CIT ——, ——, 682 F. Supp. 552, 564 (1988); *Maine Potato Council* v. *United States,* 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985). As Congress has explained:

[7] The statutory indicators are set forth as follows:

(C) Evaluation of volume and of price effects

For purposes of subparagraph (B)—

(i) Volume

In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) Price

In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iii) Impact on affected industry

In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—

(I) actual and potential decline in out-put, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices, and

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

> The significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence nor the absence of any factor listed in the bill can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide.

S. Rep. 249, 96th Cong. 1st Sess. 88, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 474.

In reviewing ITC's determination, it is not this court's function to decide that, were it ITC, it would have made the same decision on the basis of the evidence. *Matsusita Elec. Indus. Co.* v. *United States*, 750 F.2d 927, 936 (Fed Cir. 1984). This court must sustain a final negative injury determination by ITC unless it is unsupported by substantial evidence, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B).

A. Import Volume

Plaintiff argues that ITC's analysis of import volume must be rejected because it fails to address certain concerns raised by the court in its review of the original ITC determination. In that opinion, the court stated that "it is the *significance* of a quantity of imports and not absolute volume alone, that must guide ITC's analysis under section 1677(7)." *USX*, 11 CIT at ——, 655 F. Supp. at 490 (citing *Atlantic Sugar, Ltd.* v. *United States*, 2 CIT 18, 23, 519 F. Supp 916, 921–22 (1981)). The court rejected ITC's analysis of market penetration data which consisted solely of the statement that levels of market penetration remained low and stable, without discussing the significance of this trend or its relationship to other facts uncovered in the investigation. *Id.* This lack of explanation occurred against the setting of a flawed cumulation decision which further obscured any valid reasoning.

The court finds that ITC's causation analysis now addresses the significance of Argentine import volumes and sufficiently explains its views on market penetration while correcting other errors. While ITC once again places considerable emphasis on import volume, it analyzes the relationship of import volume to conditions and trends in the marketplace. Rather than relying on conclusory statements, ITC has placed volume data in a proper context.

Specifically, ITC emphasizes that although the absolute volume of Argentine imports rose during the period of investigation, market share data indicates that Argentine imports were growing no faster than the overall growth in the market. Remand I at 65. This fact is illustrated by the level import penetration ratios for Argentine imports during the period of investigation. Remand I at A–7. ITC notes that while this is not determinative, it is "clearly a very important fact." Remand I at 65.

The statute specifies that in evaluating the volume of imports, ITC "shall consider whether the volume of imports of the merchandise, or any increase in that volume, *either in absolute terms or rela-*

tive to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i) (1982) (emphasis added). "This language when read in conjunction with the legislative history indicates that disjunctive language was chosen to signify congressional intent that the agency be given broad discretion to analyze import volume in the context of the industry concerned." *Copperweld Corp.* v. *United States,* 12 CIT ——, ——, 682 F. Supp. 552, 570 (1988); *see* S. Rep. No. 249, 96th Cong., 1st Sess. 88, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 474.[8]

In focusing its attention on the relative share of the domestic market held by Argentine imports, ITC fulfilled its statutory duty to analyze the volume of imports in either an absolute or relative sense depending upon what is appropriate under the circumstances. ITC's preference for relative import data here, as opposed to volume increases in absolute terms, given the increase in domestic consumption, was reasonable. *Copperweld,* 12 CIT at ——, 682 F. Supp. at 570. ITA related import data to improving conditions in the domestic market and other conditions of trade. All of this is analyzed after proper focus on the relationship to imports from other sources.

B. Pricing and Price Effects

In its analysis of pricing and price effects of Argentine imports, ITC acknowledged that it confirmed several instances of underselling, but decided to give this evidence limited weight due to the relatively small number of comparisons made, the limited number of transactions on which each comparison was based, and the fact that certain product and quality differences exist between the Argentine and domestic product. Remand I at 68.

Plaintiff challenges this analysis, arguing that ITC has "inexplicably" discounted and diminished uncontroverted evidence of underselling and that "[i]n an investigation of a highly fungible product, evidence of increasing import volumes and consistent underselling 'are evidence of lost sales and revenues due to imports and, more particularly, lost sales due to pricing.' *Lone Star Steel Co.* v. *United States,* 10 CIT ——, 650 F. Supp. 185, 186 (1986)." Plaintiff's Brief, Ex. 1 at 24–25.

As indicated, *supra,* it is within ITC's discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis. *Maine Potato,* 9 CIT at 300, 613 F. Supp. at 1244. The court finds it reasonable for ITC to give less weight to evidence of underselling when the sample from which the conclusion of underselling is drawn is relatively small.

ITC observes that Argentine import prices were raised roughly 10–15 percent in the beginning of 1984, before any ITC action on

[8] The legislative history states in relevant part:

> It is expected that in its investigation the Commission will continue to focus on the conditions of trade, competition, and development regarding the industry concerned. For one industry, an apparently small volume of imports may have a significant impact on the market; for another, the same volume might not be significant.

the petition. ITC states that this pricing behavior was "particularly passive in view of the price sensitivity * * * of cold rolled sheet," and the fact that these "price escalations occurred even though Argentina was merely maintaining a stable market penetration of less than 1%, and was actually losing position relative to other importing countries." Remand I at 50. Although domestic prices rose during the same period, they rose to a lesser extent. *See* Confidential Record Document Number (CR) 9A at A–32. Thus, the domestic price rise does not detract significantly from the conclusion that Argentina acted benignly in the marketplace.

The court rejects plaintiff's contention that evidence of underselling when combined with evidence of increasing import volumes necessarily indicates injury due to pricing in cases involving fungible products such as steel. The significance of the various factors affecting an industry depends on the facts of each case. In *Lone Star Steel,* the case cited by plaintiff in support of this argument, the court found that under certain conditions of trade evidence that sales were lost to lower priced imports existed apart from any specifically confirmed example. One of the conditions of trade noted was that U.S. demand for oil country tubular goods was decreasing during the period of investigation. *Lone Star Steel,* 10 CIT at ——, 650 F. Supp. at 186. This stands in contrast to the present case in which consumption was rising during the period of investigation. In any case, the court sustained the negative decision in *Lone Star Steel* because the court did not find that evidence of lost sales mandated an affirmative finding and other evidence supported the negative conclusion. Furthermore, in this case ITC cites the additional factors of lack of direct competition with the domestic industry because of product and quality considerations. Remand I at 68; *see id.* at A–12 and 14, CR 17 at 17 and 21.

C. Lost Sales and Revenue Allegations

Finally, in evaluating the impact of Argentine imports on the U.S. industry, ITC looked at allegations of lost sales and revenue. In its review of ITC's original determination, the court criticized ITC's determination for its reliance upon instances of lost sales and revenue in light of the agency's admitted failure to investigate a number of lost sales and revenue allegations. *USX,* 11 CIT at ——, 655 F. Supp. at 491.[9]

ITC has now pursued these remaining allegations. Remand I at A–10–15; CR 17 at 15–23. From this information ITC concludes that "there was little direct competition between Argentine and domestic steel in the relevant period [and that] Argentine steel was not being marketed aggressively with the domestic product." Remand I at 69. Furthermore, ITC notes that "most of the allegations, with the exception of some very small tonnages, were not confirmed or

[9] In that opinion, the court faulted ITC for failing to investigate "four of seven allegations of lost sales and all three reported instances of lost revenue." *USX,* 11 CIT at ——, 655 F. Supp. at 491. There was some confusion caused by the earlier staff report; it now appears that USX submitted five allegations of lost sales and two allegations of lost revenue. Remand I at A–10, 12. The significance of the failure to investigate is the same, however.

involved much smaller amounts or very different prices than were alleged." *Id.* The court finds that this evidence supports ITC's conclusions. The totality of the evidence cited by ITC in support of its determination on remand leads the court to the conclusion that it is compelled under the standards established by binding precedent to conclude that the determination is supported by substantial evidence.

In summary, the court finds that ITC's determination that an industry in the United States is not materially injured by reason of imports of the subject merchandise to be supported by substantial evidence and otherwise is in accordance with law.

(Slip Op. 88–126)

AMERICAN AIR PARCEL FORWARDING CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–07–00995

Before DICARLO, *Judge.*

Application for attorneys fees under Equal Access to Justice Act is denied because (1) the applicant did not meet its burden of proving it was a "party" at the time the action was filed because the only evidence offered was a corporate balance sheet for a fiscal year ending four years after the action was filed, (2) the position of the United States government was substantially justified, and (3) special circumstances exist that would make unjust an award of fees and costs.

[Plaintiff's application for attorneys fees and other expenses against the United States is denied.]

(Decided September 20, 1988)

McLaughlin & Stern, Ballen and Ballen (*S. David Harrison*) for plaintiff, American Air Parcel Forwarding Company, Ltd.

Sandler Travis & Rosenberg, P.A. (*Leonard Rosenberg*) for plaintiffs, St. Paul Fire and Marine Insurance Co. and E. C. McAfee Co.

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Kenneth N. Wolf,*) for defendants.

DICARLO, *Judge:* American Air Parcel Forwarding Co. (AAP) has applied for attorneys fees and other expenses for the services of S. David Harrison, Mark J. Reidy, and Lawrence B. Schlang under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (Supp. IV 1986). The Court denies the application because AAP has not shown that it is a party within the meaning of the EAJA; the position of the government was "substantially justified"; and special circumstances exist which would make an award of fees and expenses unjust.

DISCUSSION

The EAJA provides a mechanism by which parties can collect attorneys' fees and expenses against the United States. The EAJA provides in pertinent part that:

> a court shall award to a prevailing party other than the United States fees and other expenses * * *, incurred by that party in any civil action * * * brought by or against the United States * * *, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2421(d)(1)(A) (Supp. IV 1986).

I. AAP's PARTY STATUS

The threshold inquiry in deciding whether to award attorneys' fees and expenses is to determine whether the claimant is a "prevailing party" within the meaning of the statue. *Dunn* v. *United States,* 842 F.2d 1420, 1433 (3d Cir. 1988). The EAJA defines "party" in relevant part as:

> any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the *net worth of which did not exceed $7,000,000 at the time the civil action was filed,* * * *

28 U.S.C. § 2412(d)(2)(b)(ii) (Supp. IV 1986) (emphasis added). As claimant, the burden of proof is on AAP to establish that its net worth did not exceed $7,000,000 "at the time the civil action was filed." *Dunn,* 842 F.2d at 1433.

The only evidence AAP supplied to prove its net worth was below this ceiling is a balance sheet for the fiscal year ending December 31, 1987. This date is four years after the action was filed in July of 1983. While this balance sheet shows AAP's net assets to be substantially below the $7 million limit, a corporation's financial position may change radically in the space of four years. The Court finds AAP has failed to make a *prima facie* showing that it is a party within the meaning of the EAJA.

II. SUBSTANTIAL JUSTIFICATION

Even if AAP had shown it is a party, fees and expenses may still be denied if the government can show that its position was "substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (Supp. IV 1986); *Martin* v. *Heckler,* 754 F.2d 1262, 1264 (5th Cir. 1985). On the issue of substantial justification, the test is one of reasonableness. There is no presumption of unreasonableness merely because the government lost its case. *Grand Blvd. Improvement Co.* v. *City of Chicago,* 553 F. Supp. 1154, 1162 (N.D. Ill. 1982). Rather, the government's position can be substantially justified "if a reasonable person could think it correct,

that is, if it has a reasonable basis in law and fact." *Pierce* v. *Underwood,* 108 S. Ct. 2541, 2550 n.2 (1988).

Pierce established that it is within the discretion of the trial court to determine according to this reasonability test whether the government's position is substantially justified. The Court stated that discretionary power should repose in the trial court both in the interests of the sound administration of justice and due to the nonamenability of such a multifarious inquiry to a generalized rule of decision. *Id.* at 2547–48. Moreover, such discretion is consistent with the text of the EAJA. The Court stated that the statutory language "unless the court finds" "emphasizes the fact that the determination is for the [trial] court to make." *Id.* at 2547.

The Court finds four factors provide a sufficiently reasonable basis in law and fact to conclude that the government's position was substantially justified. First, no prior reported decisions have construed the term "assembled merchandise" under "transaction value" provision in 19 U.S.C. § 1401a (1982), which the court of appeals found to be a crucial question. *E.C. McAfee Co.,* 842 F.2d at 317. Nor were there any prior value decisions of this court under Title II of the Trade Agreements Act of 1979.

Second, the court of appeals found that the issue in this case—"whether the merchandise being assembled by the tailors was for exportation to the United States"—was a question of fact. *Id.* at 318. In overturning this Court's factual determination, the court of appeals nowhere intimated that the government's position ran afoul of any reasonableness standard on the facts presented.

Third, the facts underlying the initial decision of this court were stipulated to by the parties including AAP. Thus, AAP could only assert that the legal rather than factual position of the government was not substantially justified. According to the government, its legal position was based upon its reasonable interpretation of the statute, legislative history, and relevant case law. *See Grand Blvd. Improvement Co.,* 553 F. Supp. at 1163.

Finally, the court of appeals did not reverse this Court's finding for the government on the key question of the allegedly illegal retroactive revocation of a Customs Service ruling on valuation under the Trade Agreements Act of 1979 (identified as TAA #10). *See* 15 Cust. B. & Dec. 876 (Oct. 17, 1980). Rather, it merely vacated the finding without reaching the question of the merits. *E.C. McAfee Co.,* 842 F.2d at 319. Thus, the Custom's Service decision in that regard was and remains presumptively correct according to 28 U.S.C. § 2639(a)(1) (1982). *Response to American Air Parcel Forwarding Co. Ltd.'s Application for Fees and Costs,* at 9–10.

The Court denies AAP's application for attorney's fees and other costs on the grounds that the government's position was substantially justified.

III. Special Circumstances

Special circumstances also exist which would make unjust an award of fees and expenses. Special circumstances have been recognized where the government unsuccessfully advanced novel and credible legal theories in good faith. Congress provided "[t]his 'safety valve' * * * to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretation of the law that often underlie vigorous enforcement efforts." S. Rep. No. 253, 96th Cong., 1st Sess. 7 (1979); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4990. *See also L.G. Lefler, Inc.* v. *United States,* 801 F.2d 387, 388–90 (Fed. Cir. 1986).

As discussed above, this case was one of first impression. To award attorneys' fees in such a case could have a chilling effect on the Customs Service from appraising any merchandise adversely to an importer if there has been no previous judicial construction of the particular terms of the value statute to the type of transaction in issue. Approval of AAP's application could thus diminish vigorous defense by the government in such cases of first impression. The overall effect of such a posture would be adverse to the revenue and public interest and not within the intent of Congress under the EAJA. Thus, the Court finds that special circumstances in this case would make unjust an award of attorneys' fees to AAP.

IV. Conclusion

The Court finds that AAP has failed to establish that it is a party within the meaning of the EAJA, that the position of the Government was substantially justified, and that special circumstances exist which make unjust an award of attorneys' fees. Therefore, the Court denies the application of AAP for attorneys' fees and other expenses under the EAJA.

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Fifth Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, November 18, 1988 in The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The theme of the Conference is: "The Administration of Justice—the Responsibility of Bench and Bar: Evaluating the Fairness, Efficiency and Cost-Effectiveness of Litigation."

The Honorable Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, United States House of Representatives, will present Chief Judge Re with the Court's Distinguished Service Award for his outstanding contributions to the administration of justice in the field of international trade law.

The Honorable Howard T. Markey, Chief Judge, United States Court of Appeals for the Federal Circuit, will be a special guest.

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 400 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past four Annual Judicial Conferences.

Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Friday, November 4, 1988.

For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Dated: October 7, 1988.

JOSEPH E. LOMBARDI,
Clerk of the Court.

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*U.S. G.P.O. 1988-241-040:80010